JK
1728
M7
c.2

MAY 4 '72

FORDHAM UNIVERSITY LIBRARY

DUANE

This book is due not later than the date stamped above. For each book kept overtime there is a fine of 5c for each day.

FACULTY MEMBERS MUST RETURN ALL BOOKS AT THE CLOSE OF THE SPRING SEMESTER.

FORDHAM UNIVERSITY
LIBRARY
NEW YORK, N.Y.

Digitized by the Internet Archive
in 2026

https://archive.org/details/dueprocessoflaw0000rodn

FROM
COLLECTION

FORDHAM
UNIVERSITY
LIBRARIES

DUE PROCESS OF LAW

A HISTORICAL AND ANALYTICAL TREATISE OF
THE PRINCIPLES AND METHODS FOLLOWED
BY THE COURTS IN THE APPLICATION
OF THE CONCEPT OF THE "LAW
OF THE LAND"

BY

RODNEY L MOTT PhD

INDIANAPOLIS
THE BOBBS-MERRILL COMPANY
PUBLISHERS

1728
.M7

COPYRIGHT 1926
BY THE BOBBS-MERRILL COMPANY

PREFACE

The requirement that no person shall be deprived of "life, liberty, or property without due process of law" has provoked more litigation than any other part of our Constitution. Its only real competitor, in this respect, is the section dealing with the powers of Congress, and nearly three times as many cases have been decided under the Fifth and Fourteenth Amendments as under the entire eighth section of the First Article. There is a larger body of case law centering around these two amendments than around all the rest of the protections of private rights in the federal Constitution. In fact, so numerous have the cases on due process become, that it is all too easy to lose one's self in the forest of details and miss completely the principles which lie back of the decisions. There seems to be no better way to bring out these principles than to study their historical development. James Wilson possibly had this in mind when he told his students that "Law should be studied and taught as a historical science."

Every successful lawyer must be something of a legal prophet. A client is not interested in what the courts have held, much less in what they ought to hold; what he wants to know is what decision they will render in his particular difficulty. An attorney may rely upon several methods in forecasting the result of a case. The experience of many a clever and intelligent lawyer, however, has shown that either the method of analogy or a temperamental analysis of the judges is of itself inadequate for this purpose. There remains the analysis of the fundamental principles which lie deeper than superficial differences in form or temperament. If there can be found basic principles so fundamental that the courts tend to recur to them in case after case, the attorney who recognizes them and advises his clients accordingly is certain to be correct the great majority of the times. It is the object of this book to trace the origin and development, as well as the application, of those principles which the courts have developed as part of the concept of due process of law.

At first glance it may seem that a disproportionate emphasis has been placed on the earlier growth of the concept, but it must be remembered that the older the principle, the more fundamental it is. The evolution of due process has stretched over a period of seven hundred years. In spite of the rapid increase in the number of cases during the past three decades, the roots of this development lie buried under hundreds of years of historical accretion. In so far as the facts of English and American constitutional history throw light upon the present attitude of the courts, it becomes necessary to take them into account; and had the study been confined to the recent cases, it would have lacked the perspective which is so necessary in interpreting them, to say nothing of forecasting the possible lines of future development.

Whenever possible the material has been taken from the original sources and the conclusions subsequently checked against those of contemporaneous criticism. No one realizes the limitations involved in the use of this kind of data more than I. At any time supplementary information may be discovered which will require a modification, if not indeed a complete scrapping of the conclusions reached. But this limitation is in itself a challenge, and it is hoped that others may carry the work of research much further both in depth and in scope. In order to facilitate this, as well as to aid the attorney who may wish to give direct citations to the authorities in his brief, a full citation of both historical and legal authorities is given in the footnotes. The cases cited are divided into two classes. At the beginning of the footnote will usually be found a group of the more significant and leading cases, many of which are given with short quotations from the opinion or a brief comment on the rule developed. Following these cases will be found citations to other cases of a more general import which bear either directly or indirectly upon the point in question.

In addition to its legal and historical bearings this book has important implications for the study of political science. While extensive investigations have been carried on in almost every other field of politics, the judiciary seems to have been almost forgotten. Under the peculiar constitutional system in the United States, this is especially unfortunate, for there is perhaps no

more important function in the entire government than the deciding on the constitutionality of statutes. An important purpose of this work, therefore, is to make a beginning in the study of the technique of judicial review. Given a constitutional provision of general import, given a judiciary with Anglo-American traditions, given a rapidly changing economic and social scene, it is sought to determine how the court will react. This is, of course, of tremendous practical importance to the attorney who is pleading a case at bar, but it is certainly of no less importance to the political scientist who wishes to understand the operations of our government, or the student of legislation or member of the legislature who wishes to know how a law may be drafted in order to avoid the pitfalls of unconstitutionality.

The technique of legislation is, after all, but a method of translating the public will into effective statutory requirements. Among the many snares to be avoided in this regard, perhaps none has caused more difficulty than the apparent bar which due process of law has placed in the way of social and economic legislation. It is the view of the writer that in many cases this bar is more apparent than real, and that, by carefully following the principles of judicial technique in most cases of this kind, legislation may be drafted to conserve every legitimate interest which at the same time will accord with the Fourteenth Amendment. It is hoped that this book may be found to be of some practical value to the student of legislation in this regard.

This research was undertaken at the suggestion of Professor Arnold B. Hall of the University of Wisconsin, and very recently selected as president of the University of Oregon, and any merit which it may have is due very largely to his counsel and aid. I owe much more to his enthusiasm and inspiration than can possibly be repaid by a note in the preface. I am also deeply indebted to Professors F. A. Ogg and Ernst Freund, who have read portions of the manuscript and have given many valuable suggestions for its improvement. But neither these, nor the many other friends who have so generously helped in this study can be held responsible for its conclusions or its errors.

RODNEY L. MOTT.

Chicago,
May 3, 1926.

TABLE OF CONTENTS

PART I

THE PHRASING OF DUE PROCESS

CHAPTER		PAGE
I.	Phrasing of Due Process in England and English Colonies	1
II.	Due Process in American Constitutions	14

PART II

DUE PROCESS OF LAW IN ENGLAND

III.	Magna Carta	30
IV.	England's Fundamental Law	46
V.	English Content of the "Law of the Land"	71

PART III

DUE PROCESS IN THE AMERICAN COLONIES

VI.	The Fundamental Law in the Colonies	87
VII.	Colonial Meaning of Due Process	106
VIII.	The American Revolution	125

PART IV

EXTRA-JUDICIAL INTERPRETATION OF DUE PROCESS

IX.	The Federal Government	143
X.	State Constitutional Conventions	168
XI.	Due Process in Legal Treatises	179

PART V

DUE PROCESS AND PROCEDURE

XII.	The Legislature and Procedure	192
XIII.	Notice and Hearing	208
XIV.	Due Process and Settled Usage	241

PART VI

CLASSIFICATION

CHAPTER		PAGE
XV.	Due Process and Equality	256
XVI.	The Equal Protection of the Law	275

PART VII

THE POLICE POWER

XVII.	Due Process as a Police Power Limitation	300
XVIII.	The Supreme Court and the Police Power	329

PART VIII

POWER TO ALTER CORPORATE CHARTERS

XIX.	The Dartmouth College Case and Corporate Charters	361
XX.	Regulations for the Public Benefit	393

PART IX

DUE PROCESS AND PUBLIC PURPOSE

XXI.	Cooperative Improvement as a Public Purpose	434
XXII.	Public Purpose and Business Enterprise	468
XXIII.	Governmental Purposes	505

PART X

QUESTIONS OF FACT AND PUBLIC OPINION

XXIV.	Evidence in Due Process Cases	538
XXV.	Legislative Determination of Facts and Judicial Technique	562

PART XI

CONCLUSION

XXVI.	The Function of Due Process of Law	589

INDEX ---- 605

TABLE OF CASES ---- ix

TABLE OF CASES

[*References are to Sections.*]

A

Aachen & Munich Fire Ins. Co. v. Omaha, 72 Nebr. 518 143
Abbey Land & Imp. Co. v. San Mateo County, 167 Cal. 434 115
Abeel v. Clark, 84 Cal. 226 128
Abernathy v. State, 15 Ala. App. 595 120
Acworth v. Western &c. R. Co., 159 Ga. 610 149
Adair v. United States, 208 U. S. 161 83, 85, 108, 128
Adams v. Cronin, 29 Colo. 488 120
v. Memphis R. Co., 42 Tenn. 645 185
v. Milwaukee, 228 U. S. 570 90, 217, 234
v. Palmer, 51 Maine 480 104
v. Tanner, 244 U. S. 590 127, 220, 229, 234
v. Yazoo &c. R. Co., 77 Miss. 194 91
Adams Exp. Co. v. Board of Police, 65 How. Pr. (N. Y.) 72 116
Adeline G. Nott's Case, 11 Maine 208 87
Adena R. Co. v. Public Serv. Commn., 92 Ohio St. 1 149
Adirondack R. Co. v. People, 176 U. S. 335 202
Adkins v. Children's Hospital, 261 U. S. 525 85, 131, 133, 216, 217, 218, 226, 229
Adlof, Ex parte, 86 Tex. Cr. 13 115
Admiral Realty Co. v. New York, 206 N. Y. 110 186
Adrian Janes, Matter of, 30 How. Pr. (N. Y.) 446 88
Advocate General v. Hancock, Quincy (Mass.) 460 51
Aetna Ins. Co. v. Robertson, 131 Miss. 343 91
Agawam v. Hampden, 130 Mass. 528 171
Agee v. Smith, 7 Wash. 471 152
Ah Fong, In re, 3 Saw. (U. S.) 144 91
Ah Fook, Ex parte, 49 Cal. 402 97
Ah How v. United States, 193 U. S. 65 91
Ah Yuk, In re, 53 Fed. 781 91
Aikens v. Wisconsin, 195 U. S. 194 127
Air-Way Elec. App. Corp. v. Archer, 279 Fed. 878 108, 142
v. Day, 266 U. S. 71 142, 143
Ajuria, In re, 188 Cal. 799 120
Aki, In re, 32 Cal. App. 483 120
Akron, C. &c. R. Co. v. United States, 261 U. S. 184 90
Alabama &c. R. Co. v. Jackson &c. R. Co., 131 Miss. 857 180
Alabama &c. Trans. Co. v. Doyle, 210 Fed. 173 151
Alabama Power Co. v. Gulf Power Co., 283 Fed. 606 89, 180
v. Talmadge, 259 U. S. 575 91
Alabama Trac. Co. v. Selma T. & S. Bank (Ala.), 104 So. 517 149
Alabama Western R. Co. v. Talley-Bates Const. Co., 162 Ala. 396 151
Albany, N. R. Co. v. Brownell, 24 N. Y. 345 149, 161
Albany Street, In re, 11 Wend. (N. Y.) 149 68, 102
Albert v. White, 33 Md. 297 104
Albia v. Chicago, B. &c. R. Co., 102 Iowa 624 149
Albin v. Consolidated School Dist., 106 Nebr. 719 89
Albright v. Sussex County L. & R. Commn., 71 N. J. L. 303 202
Alby v. Smith, 178 Wis. 138 120
Alderman v. Wells, 85 S. Car. 507 108
Aldredge v. School Dist. No. 16, 10 Okla. 694 89
Alexander v. Atlanta &c. R. Co., 108 Ga. 151 141
v. City Council, 134 Ga. 849 180
Alexandria v. Dearmon, 34 Tenn. 104 93, 103
Alfalfa Irr. Dist. v. Collins, 46 Nebr. 411 176
Allegeyer v. Louisiana, 165 U. S. 578 127, 142
Allegheny v. Western Pennsylvania R. Co., 138 Pa. 375 169
Allen v. Ajax Min. Co., 30 Mont. 490 141
v. Georgia, 166 U. S. 138 91
v. Jay, 60 Maine 124 188, 189
v. McKean, Fed. Cas. No. 229 139
v. Milwaukee, 128 Wis. 678 151
v. Peden, 5 N. Car. 442 99
v. Scott, 104 Ohio 436 147, 151
v. Taunton, 19 Pick. (Mass.) 485 202
v. Williams, 31 Idaho 309 90
Allen, In re, 82 Vt. 365 90
Allison v. Louisville, H. C. &c. R. Co., 10 Bush. (Ky.) 1 185

[*References are to Sections.*]

Allyn's Appeal, 81 Conn. 534 114, 120
Alma Coal Co. v. Cozad, 79 Ohio St. 348 178
Almand v. Board of Drainage Commrs., 147 Ga. 532 173
Alnutt v. Inglis, 12 East (K. B. 1810) 527 122
Alsos v. Kendall, 111 Ore. 359 115
Altgelt v. San Antonio, 81 Tex. 436 122
Alton Woods, Case of, 1 Coke (1600) 47 20, 82
Alvord v. Little, 16 Fla. 158 94
American Coal Co v. Consolidation Coal Co, 46 Md. 15 148, 162
American De Forest Wireless Tel. Co. v. San Francisco Super. Ct., 153 Cal. 533 88
American Ex. Co. v. People, 133 Ill. 649 90
American Falls Reservoir Dist. v. Thrall, 39 Idaho 105 112
American Fidelity Co. v. Bleakley, 157 Iowa 442 142
American Fire Ins. Co. v. King Lumber &c. Co., 250 U. S. 2 142
American Land Co. v. Zeiss, 219 U. S. 47 88, 90, 128
American Malt Corp. v. Board of Pub. Util. Commrs., 86 N. J. L. 688 139
American Print Wks. v. Lawrence, 21 N. J. L. 248 128
v. Lawrence, 23 N. J. L. 9 90
v. Lawrence, 23 N. J. L. 590 115
American Refrigerator Trans. Co. v. Thomas, 28 Colo. 119 89
American School of Magnetic Healing v. McAnnulty, 102 Fed. 565 88
American Seeding Mach. Co. v. Kentucky, 236 U. S. 660 132
American Smelting &c. Co. v. Colorado, 204 U. S. 103 143, 146
American Steel & W. Co. v. Speed, 192 U. S. 500 142
American T. & T. Co. v. St. Louis &c. R. Co., 202 Mo. 656 180
American Tobacco Co. v. Missouri Pac. R. Co., 247 Mo. 374 149
American Uniform Co. v. Commonwealth, 237 Mass. 42 142, 143
Ames v. People, 26 Colo. 83 142
v. Port Huron Log &c. Co., 11 Mich. 139 88
Amey v. Allegheny City, 24 How. (U. S.) 364 185
Anderson v. Commonwealth, 18 Grat. (Va.) 295 151
v. Grand Valley Irr. Dist., 35 Colo. 525 177
v. Great Northern R. Co., 25 Idaho 433 110
v. Henry, 45 W. Va. 319 90
v. Hill, 54 Mich. 477 171, 199
v. Kerns Draining Co., 14 Ind. 199 173, 174
Anderson v. Messenger, 158 Fed. 250 96, 98
v. Ocala, 67 Fla. 204 172
v. Ocala, 83 Fla. 344 89
v. Ritterbusch, 22 Okla. 761 89
v. Santa Anna, 116 U. S. 356 185
v. Shepard, 285 Ill. 544 106
v. Smith-Powers Logging Co., 71 Ore. 276 171
v. Uncle Sam Oil Co., 106 Kans. 483 106, 152
Andrews v. Beaumont, 51 Tex. Civ. App. 625 120
v. South Haven, 187 Mich. 294 204, 207
v. Swartz, 156 U. S. 272 91
v. United States, 2 Story 202 198
Andrews, Ex parte, 18 Cal. 678 116, 214
Angelus v. Sullivan, 246 Fed. 54 91
Angove v. State, 9 Ohio Dec. 829 107
Anheuser-Busch Brew. Assn. v. Houck (Tex. Civ. App.), 27 S. W. 692 153
Anixter, Ex parte, 22 Cal. App. 117 120
Anna v. Northern, 261 Ill. 538 149
Annable v. Patch, 3 Pick. (Mass.) 360 100
Anna's Asylum v. New Orleans, 105 U. S. 362 144
Antonelli v. State, 6 Okla. Cr. 157 87
Apex Transp. Co. v. Garbade, 32 Ore. 582 89, 171
Appeal Tax Court v. University, 50 Md. 457 144
v. Wagner, 120 Md. 671 89
Applebaum v. United States, 256 U. S. 704 91
Appleby v. Buffalo, 221 U. S. 524 112
Argyle v. Johnson, 39 Utah 500 89
Arizona Copper Co. v. Hammer, 250 U. S. 400 110, 224
Arizona Employers' Liability Cases, 250 U. S. 400 96, 199
Arizona Power Co. v. State, 19 Ariz. 114 152
Arkadelphia Elec. Co. v. Arkadelphia, 99 Ark. 178 148
Arkansas Rate Cases, In re, 187 Fed. 290 114
Arkansas Stave Co. v. State, 94 Ark. 27 152, 159
Armour Fertilizer Wks. v. Parrish Fruit Co., 63 Fla. 64 90
Armour Packing Co. v. Vinegar Bend Lumber Co., 149 Ala. 205 142
Armstrong v. Jackson, 1 Blackf. (Ind.) 374 103
Armstrong Co. v. New York &c. R. Co., 129 Minn. 104 151
Arnold v. Covington &c. Bridge Co., 1 Duval (Ky.) 372 180

[*References are to Sections.*]

Arnson v. Murphy, 115 U. S. 579 89
Arnsperger v. Crawford, 101 Md. 247 171
Arrowsmith v. Burlingim, Fed. Cas. No. 563 103
v. Burlingim, 1 Fed. Cas. 1187 81, 88
v. Harmoning, 118 U. S. 194 91
Ascarate v. New Mexico, 245 U. S. 625 98
Ashland Lumber Co. v. Detroit Salt Co., 114 Wis. 66 151
Ashley v. Ryan, 153 U. S. 436 142
v. Three Justices, 228 Mass. 63 89, 90
Ashley County v. Bradford, 109 La. 641 89
Ashon v. Board of Commrs., 185 Fed. 221 90
Ashton-Jenkins Co. v. Bramel, 56 Utah 587 90
Ashuelot R. Co. v. Elliott, 58 N. H. 451 154, 155
Assaria State Bank v. Dolley, 219 U. S. 121 139, 159
Astor v. New York, 37 N. Y. S. 539 89
Atchison v. Butcher, 3 Kans. 104 185
v. Lucas, 83 Ky. 451 198
Atchison &c. R. Co. v. Baty, 6 Nebr. 37 97, 104, 124
Atchison, T. &c. R. Co. v. Campbell, 61 Kans. 439 160
v. Fletcher, 35 Kans. 236 141
v. Lyon County, 8 Kans. App. 597 159
v. Miller, 28 Okla. 109 149
v. State, 23 Okla. 510 149
v. State, 27 Okla. 565 149
Atkin v. Kansas, 191 U. S. 207 127
Atkins v. Grey Eagle Coal Co., 76 W. Va. 27 152
Atkinson v. Disher, 177 Ind. 665 120
v. Southern Exp. Co., 94 S. Car. 444 120
Atlanta v. Central R. & Banking Co., 53 Ga. 120 89
Atlanta &c. R. Co. v. Easley, 117 S. Car. 494 88
Atlanta Consol. St. R. Co. v. Atlanta, 111 Ga. 255 149
Atlanta, S. M. &c. R. Co. v. Bradley, 141 Ga. 740 180
Atlanta Steel Co. v. Mynahan, 138 Ga. 668 139
Atlantic &c. R. Co. v. United States, 76 Fed. 186 148
Atlantic Coast Line R. Co. v. Coachman, 59 Fla. 130 114
v. Daughton, 262 U. S. 413 142
v. Goldsboro, 232 U. S. 548 123
v. North Carolina Corp. Commn., 206 U. S. 1 141
v. Railroad Commn., 89 S. Car. 472 145
Atlas Powder Co. v. Goodloe, 131 Tenn. 490 142
Attorney-General v. Bay State Min. Co., 99 Mass. 148 142
Attorney-General v. Booth, 143 Mich. 89 153
v. Chicago &c. R. Co., 35 Wis. 425 162
v. Eau Claire, 37 Wis. 400 190
v. Electric Storage Battery Co., 188 Mass. 239 142
v. Germantown &c. Tpk. Rd., 55 Pa. 466 124
v. Jochim, 99 Mich. 358 88, 91
v. Looker, 111 Mich. 498 140
v. National Cash Reg. Co., 182 Mich. 99 153
v. Pelletier, 240 Mass. 264 91
v. Williams, 174 Mass. 476 202, 203
Attorney's Oaths, In re, 20 Johns. (N. Y.) 492 116
Atwater v. Woodbridge, 6 Conn. 223 144
Auburn v. Union Water Power Co., 90 Maine 576 204
Auffmordt v. Hedden, 137 U. S. 310 89
Augusta v. Bredenberg, 146 Ga. 459 115
Augusta Bank v. Augusta, 49 Maine 507 167, 185
Aultman v. Hodge, 147 Ga. 626 91
Aurora v. West, 9 Ind. 74 181, 185, 205, 206
Aurora Water Co. v. Aurora, 129 Mo. 540 204, 205
Austin v. Austin City Assn., 87 Tex. 330 115
v. State, 10 Mo. 591 120
v. Tennessee, 179 U. S. 343 219
Auten v. School Board, 83 Ark. 431 128
Automobile Material Co. v. American Stan. Metal Prod. Corp., 232 Ill. App. 532 151
Auxiliary Eastern Canal Irr. Dist., In re, 24 Ariz. 163 177
Avent Beattyville Coal Co. v. Commonwealth, 96 Ky. 218 152
Avery v. Vermont Elec. Co, 75 Vt. 235 192, 193
Avondale Land Co. v. Shook, 170 Ala. 379 140

B

Baader v. State, 201 Ala. 76 87
Babbitt v. Savoy, 3 Cush. (Mass.) 530 198
Babcock v. Harrsch, 310 Ill. 413 91
Back River Neck Tpk. Co. v. Homberg, 96 Md. 430 90
Backus v. Fort Street Union Depot, 169 U. S. 557 89, 91, 112
v. Lebanon, 11 N. H. 19 180
Bacon v. Board of State Tax Commrs., 126 Mich. 22 142
v. Boston & M. R., 83 Vt. 421 145
v. Locke, 42 Wash. 215 107
Badenoch v. Chicago, 222 Ill. 71 110
Badkins v. Robinson, 53 Ga. 613 90
Bagdonas v. Liberty Land & Inv. Co., 309 Ill. 103 91
Bagg's Appeal, 43 Pa. 512 102, 104

[*References are to Sections.*]

Bagg's Case, 11 Coke (1616) 93b 25
Bailey v. Drexel Furn. Co., 259 U. S. 20 93, 143, 183
v. Mayor of New York, 3 Hill (N. Y.) 531 141
v. Philadelphia, 184 Pa. 594 122
v. Power St. M. E. Church, 6 R. I. 491 140
v. Sioux Falls, 28 S. Dak. 118 89
Baillie v. Larson, 138 Fed. 177 112
Baines v. Marshfield &c. R. Co., 62 Ore. 510 180
Bains v. The James & Catherine, Fed. Cas. No. 756 87
Baird's Estate, In re, 173 Cal. 617 87
Baker v. Boston, 12 Pick. (Mass.) 184 115
v. Druesedow, 263 U. S. 137 108
v. Grand Rapids, 142 Mich. 687 206
v. Kelley, 11 Minn. 480 110
v. Norwood, 172 U. S. 269 112
v. State, 147 Tenn. 421 120
v. Windham, 13 Maine 74 198
Baker's Appeal, 109 Pa. 461 140
Baker City Mut. Irr. Co. v. Baker City, 58 Ore. 306 145
Balch v. Glenn, 85 Kans. 735 88, 90, 96, 123
Baldauf v. State, 87 Tex. Cr. 228 120
Baldwin v. Smith, 82 Ill. 162 124
Baldwin Tool Works v. Blue, 240 Fed. 202 142
Ball v. Red Square Oil & G. Co., 113 Kans. 760 89
Ballard v. Hunter, 204 U. S. 241 91, 96
Ballestra's Petition, In re, 173 Cal. 657 152
Balling v. Board of Excise, 79 N. J. L. 197 88, 91
Baltic Mining Co. v. Commonwealth, 231 U. S. 68 142
Baltimore v. Dobler, 140 Md. 634 112
v. Keeley Inst., 81 Md. 106 195
v. Scharf, 54 Md. 499 88, 124
Baltimore &c. R. Co. v. Burdalow, 57 Ind. App. 267 152
v. Maryland, 21 Wall. (U. S.) 456 142
v. Sawvell, 138 Ind. 696 88, 89
v. Spring, 80 Md. 510 185
v. State ex rel., 159 Ind. 510 149
v. Van Ness, 4 Cranch. (U. S.) 595 180
Baltimore Sav. Bank v. Weeks, 103 Md. 601 88
Baltimore Trac. Co. v. Baltimore Belt R. Co., 151 U. S. 137 87
Bancroft v. Lynnfield, 18 Pick. (Mass.) 566 198
Bank v. Bond, 1 Ohio St. 672 136
Bankers Trust Co. v. Blodgett, 96 Conn. 361 88, 108
Bankers Trust Co. v. Blodgett, 260 U. S. 647 91
Bank of Arizona v. Howe, 293 Fed. 600 88
Bank of Augusta v Earle, 13 Pet. (U. S.) 519 142
Bank of Blytheville v. State, 148 Ark. 504 147, 151
Bank of Columbia v. Okely, 4 Wheat. (U. S.) 235 79, 87, 89, 90, 110
Bank of Kentucky v. Commonwealth, 207 U. S. 258 144
Bank of Pennsylvania v. Commonwealth, 19 Pa. 144, 151 136
Bank of Rome v. Rome, 18 N. Y. 38 185
Bank of State v. Cooper, 2 Yerg. (10 Tenn.) 599 93, 101
Banks v. State, 88 Tex. Cr. 380 120
v. State, 89 Tex. Cr. 438 120
Bannerman v. Catts, 80 Fla. 170 174
Banning v. Taylor, 24 Pa. St. 289 87
Banton v. Belt Line R. Co., 268 U. S. 413 160
Barber v. Galloway, 231 Pac. 34 89
v. Hartford Life Ins. Co., 269 Mo. 21 91
v. Vinton, 82 Vt. 327 91
Barber Asphalt Pav. Co. v. Ridge, 169 Mo. 376 88, 97
Barbier v. Connolly, 113 U. S. 27 76, 86, 108, 114, 123, 124, 125, 222
Barbour v. Barbour, 46 Maine 9 102
v. Camden, 51 Maine 608 200
v. State, 146 Ga. 667 120
Barefield v. State, 85 Ark. 134 116
Barker v. People, 3 Cow. (N. Y.) 686 116
v. State Fish Commission, 88 Wash. 73 115
Barnard v. Durrence, 22 Ga App. 8 171
Barnert v. Paterson, 48 N. J. L. 395 198
Barnes v. Arnold, 23 Misc. (N. Y.) 197 151
v. Barnes, 53 N. Car. 366 88, 89. 104
v. Kornegay, 62 Fed. 671 144
Barnes' Estate, In re, 187 Cal 566 88
Barnet v. Barnet, 15 Serg. & R. (Pa.) 72 100
Barnett v. Figg Co., 165 Ky. 479 89
Barr v. New Brunswick, 67 Fed. 402 112
Barrett v. Indiana, 229 U. S. 26 123, 222
v. United States, 288 Fed. 815 87
v. Whitney, 36 Utah 574 90
Barrett, In re, 202 N. Y. S. 20 87
Barre Water Co., In re, 62 Vt. 27 187
Barrington v. Barrington, 206 Ala. 192 106
v. Missouri, 205 U. S. 483 3

[*References are to Sections.*]

Barron v. Baltimore, 7 Pet. (U. S.) 243 8, 64, 84
v. Burnside, 121 U. S. 186 145
Barron G. Collier, Inc. v. American Cafeteria, 215 Mo. App. 182 142, 151
Barrow v. Page, 6 Tenn. 97 128
Barrow Steamship Co. v. Kane, 170 U. S. 100 145
Barry v. Port Jervis, 64 App. Div. (N. Y.) 68 110
Bartels v. Iowa, 262 U. S. 404 130, 132
Bartemeyer v. Iowa, 18 Wall. (U. S.) 129 86, 120, 123
Barth v. Pock, 51 Mont. 418 147, 151, 154
Barthet v. New Orleans, 24 Fed. 563 122
Bartholomew v. Austin, 85 Fed. 359 122
Bartlett v. Wilson, 59 Vt. 23 89, 91
Bas v. State Tax Commn., 266 U. S. 271 142
Bashor v. Bowman, 133 Tenn. 269 171
Bassett v. Ocean City, 118 Md. 114 172
Bates v. Bassett, 60 Vt. 530 195
v. Kimball, 2 D. Chip. (Vt.) 77 104
v. Ransome-Crummey Co., 42 Cal. App. 699 91
Battle v. Willcox, 128 S. Car. 500 195
Batt's Case, 11 Coke (1616) 93b, 99a 20
Bauman v. Ross, 167 U. S. 548 87, 89, 169
Baxter, In re, Fed. Cas. No. 1118 116
Bayard v. Singleton, 1 N. Car. 5 79, 88
Bay Bottoms Drainage Dist. v. Stokes, 291 Ill. 68 89
Baylor, Appeal of, 93 S. Car. 414 151
Beach v. Bradstreet, 85 Conn. 344 200
v. Trudgain, 2 Gratt. (Va.) 219 90
Beall v. Beall, 8 Ga. 210 102
v. State, 4 Blackf. (Ind.) 107 107
Beamish v. State, 65 Tenn. 530 104
Bean v. Jasper &c. R. Co., 101 S. W. (Tex. Civ. App.) 874 159
Bean, In re, 201 N. Y. S. 827 151
Bearden v. Daves, 139 Ga. 635 91
Beardsley v. New York, L. E. &c. R. Co., 162 N. Y. 230 162
Beare's Estate, In re, 122 Misc. 519 87
Beatty v. United States, 203 Fed. 620 201
Beaudrot v. Murphy, 53 S. Car. 118 171
Beaupre v. Hoerr, 13 Minn. 366 94
Beck v. Shawnee County, 105 Kans. 325 195, 197, 207
Beckler Produce Co. v. American R. Exp. Co., 156 Ark. 296 91
Bedford v. Shilling, 4 Serg. & R. (Pa.) 401 80
Beebe v. State, 6 Ind. 501 118, 212
Beebe, In re, 20 Hun (N. Y.) 462 90
Beekman v. Saratoga &c. R. Co., 3 Paige (N. Y.) 45 148, 180
Beer Co. v. Massachusetts, 97 U. S. 25 120
Beirne v. Brown, 4 W. Va. 72 116
Belcher Sugar &c. Co. v. St. Louis Grain &c. Co., 101 Mo. 192 122
Bell v. State, 91 Ga. 227 120
Bell, In re, 69 Kans. 855 90
Belleville v. St. Clair County Tpk. Co., 243 Ill. 428 88, 114, 157
Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232 89, 91
Bennett v. Boggs, Fed. Cas. No. 1319 8, 84, 115
v. Collins, 157 Ga. 525 88
v. Nichols, 9 Ariz. 138 144
v. State, 49 Tex. Cr. 294 116
v. Wheatley, 154 Ga. 591 151
Bennington v. Park, 50 Vt. 178 185
Benton v. Yarborough, 128 S. Car. 481 112
Benvenuto's Estate, In re, 183 Cal. 382 90
Benwood v. Public Serv. Commn., 75 W. Va. 127 148
Berea College v. Kentucky, 211 U. S. 45 139
Berg v. Twin Falls Canal Co., 36 Idaho 62 177
Bergen County R. Co. v. State Board of Taxes, 98 N. J. L. 858 89
Bernardi v. Northern Pac. R. Co., 18 Idaho 76 159
Bernstein v. Kaplan, 15 Ala. 222 141
Berrien Springs Water P. Co. v. Berrien Circ. Judge, 133 Mich. 48 192
Berry v. DeMaris, 76 N. J. L. 301 91
Berthelemy v. Johnson, 42 Ky. 90 104
Bertholf v. O'Reilly, 74 N. Y. 509 123
Bertrand v. Taylor, 87 Ill. 235 128
Bessemer v. Bessemer Waterworks, 152 Ala. 391 148
Best v. Barnwell County, 114 S. Car. 123 87
Bethlehem Motors Corp. v. Flynt, 256 U. S. 421 107, 108, 143
Bettilyon Home Builders v. Philbrick, 31 Idaho 724 151
Beverley, In re, 3 Wm. Mary Col. Quart. (1682) 149 40
Beyman v. Black, 47 Tex. 558 97
Bianchi v. Morales, 262 U. S. 170 90

[*References are to Sections.*]

Biesantz v. Special Council, 106 Misc. 545 90
Bigelow v. Calumet &c. Min. Co., 167 Fed. 721 139
Big Four Adv. Co. v. Clingan, 15 Ariz. 34 145
Billings v. Hall, 7 Cal. 1 82, 88, 103
v. United States, 232 U. S. 261 96, 108
Billings Sugar Co. v. Fish, 40 Mont. 256 89, 174
Binford v. Boyd, 178 Cal. 458 114
Bingham v. Miller, 17 Ohio 445 104
Binns v. United States, 194 U. S. 486 165
Binyon v. United States, 4 Ind. Ter. 642 104
Birmingham Tr. & Sav. Co. v. Atlanta, B. &c. R. Co., 271 Fed. 731 90
Birmingham Waterworks Co. v. Birmingham, 213 Fed. 450 148
Bishop v. Brig Freemason, Quincy (Mass.) 387 32
Bissell v. Davison, 65 Conn. 183 128
v. Heath, 98 Mich. 472 151
v. Kankakee, 64 Ill. 249 188
Bittenhaus v. Johnston, 92 Wis. 588 115, 123
Black v. Delaware &c. Canal Co., 24 N. J. Eq. 455 139
v. New Orleans R. & L. Co., 145 La. 180 148
v. State, 113 Wis. 205 106
v. Stein, 23 Nebr. 302 91
Blackwell Lumber Co. v. Empire Mill Co., 28 Idaho 556 171
Blagge v. Balch, 162 U. S. 439 199
Blair v. Cuming County, 111 U. S. 363 192
v. Milwaukee &c. R. Co., 20 Wis. 254 159
v. Ridgely, 41 Mo. 63 116
Blake v. McClung, 172 U. S. 239 142, 145, 151
Blake, In re, 1 Blackf. (Ind.) 483 116
Blanc v. United States, 258 Fed. 921 128
Blazier v. Miller, 10 Hun (N. Y.) 435 90
Blinn v. Nelson, 222 U. S. 1 89, 217
Bliss, In re, 63 N. H. 135 107
Block v. Hirsh, 256 U. S. 135 107, 130, 131, 132, 235
v. Patrick, 35 Okla. 408 172
Bloodgood v. Mohawk &c. R. Co. 18 Wend. (N. Y.) 9 102, 180
Bloom v. Orange, 91 N. J. L. 376 172
Bloomfield v. State, 86 Ohio St. 253 120
Bloomington v. Wahl, 46 Ill. 489 122
Bloomsburg Land Imp. Co. v. Bloomsburg, 215 Pa. St. 452 207
Blue v. Beach, 155 Ind. 121 128
Bluefield Water Works &c. Co. v. Public Serv. Commn., 262 U. S. 679 229
Blue Ridge I. R. Co. v. Hendersonville L. & P. Co., 171 N. Car. 314 193
Blue River Power Co., In re, 112 Nebr. 500 193
Bluffton v. Studabaker, 106 Ind. 129 202
Blume v. Interurban St. R. Co., 41 Misc. (N. Y.) 171 160
Board of Black River Reg. Dist. v. Ogsbury, 203 App. Div. (N. Y.) 43 175
Board of Commrs. v. Anderson, 68 Fed. 341 89
v. Bearss, 25 Ind. 110 200
v. Clinton, 49 Okla. 795 91
v. Dist. Ct., 29 N. Mex. 244 90
v. Hutton, 72 Okla. 223 144
v. Johnson, 173 Ind. 76 108
Board of Councilmen v. Deposit Bank, 124 Fed. 18 146
Board of Directors of Modesto Irr. Dist. v. Tregea, 88 Cal. 334 176
Board of Drainage Commrs. v. Graves County, 209 Ky. 193 168
Board of Education v. Harper, 191 N. Y. S. 273 195
v. Illinois, 203 U. S. 553 142
v. McLansborough, 36 Ohio St. 227 199
Board of Harbor Commrs. v. Elcelsior Redwood Co., 88 Cal. 491 114
Board of Levee Commrs. v. Johnson, 178 Ky. 287 89
Board of Police Commrs. v. Wagner, 93 Md. 182 90
Board of Trade v. Olson, 262 U. S. 1 89
Board of Transp. v. Sioux City O. &c. R. Co., 46 Nebr. 682 90
Board of Trustees v. Board of Supervisors, 198 Iowa 117 89
Board of Water Commrs. v. Johnson, 86 Conn. 151 88
Boca Mill Co. v. Curry, 154 Cal. 326 139, 142
Boddy v. Continental Inv. Co., 18 Ala. App. 65 151
Bode v. State, 7 Gill. (Md.) 326 103
Boehm v. Hertz, 182 Ill. 154 195, 196
Boerner v. Thompson, 278 Ill. 152 91, 120
Bogalusa v. Blanchard, 141 La. 33 116
Bogert v. Hackensack Water Co. (N. J.), 127 Atl. 261 176
Boggs v. Commonwealth, 76 Va. 989 124
Bogigian v. Commissioner of Corporations, &c., 248 Mass. 545 89
Bogni v. Perotti, 224 Mass. 152 110
Bohen, Ex parte, 115 Cal. 372 115
Bolles v. Brimfield, 120 U. S. 759 185
Bolln v. Nebraska, 176 U. S. 83 96
Bolton v. State, 18 Ala. App. 124 120

[References are to Sections.]

Bonaker v. Evans, 16 Q. B. (1850) 162 25
Bonaparte v. State, 65 Fla. 287 104
Bond v. Atlantic Terra Cotta Co., 137 App. Div. (N. Y.) 671 140, 141
v. First National Bank, 5 Colo. 83 94
v. Mayor of Baltimore, 116 Md. 68 171
Bondholders v. Railroad Commrs., Fed. Cas. No. 1625 162
Bondi v. Mackay, 87 Vt. 271 107
Bonds of Orosi Pub. Util. Dist., In re, 235 Pac. (Cal.) 1004 88
Bondurant v. Dahnke-Walker Mill Co., 175 Ky. 774 142
Bonner v. Gorman, 213 U. S. 86 91
Bonnett v. Vallier, 136 Wis. 193 214
Booth v. Illinois, 184 U. S. 425 227
v. People, 186 Ill. 43 114
v. Scott, 276 Mo. 1 151
v. Wiegand, 30 Utah 135 142
v. Woodbury, 32 Conn. 118 200
Bordon v. Trespalacios Rice &c. Co., 204 U. S. 667 177
Borg v. New Orleans City R. Co., 244 Fed. 617 139
Borgnis v. Falk Co., 147 Wis. 327 96, 217, 226, 234
Boring v. Williams, 17 Ala. 510 87
Borrough of Dunmore v. Dempsey, 280 Pa. 190 88
Bosley v. McLaughlin, 236 U. S. 385 226
Boston &c. Mill-Dam Corp. v. Newman, 12 Pick. (Mass.) 467 187
Boston &c. R. Co. v. Cambridge, 159 Mass. 283 149
v. Greenbush, 5 Lans. 461 156
Boston Beer Co. v. Massachusetts, 97 U. S. 25 145
Boston Tow Boat Co. v. Medford Nat. Bank, 228 Mass. 484 115
Boswell v. Security Mut. Life Ins. Co., 193 N. Y. 465 145
Bosworth v. Evansville &c. Packet Co., 179 Ky. 710 89
v. Rome, 136 Ga. 398 89
Bound v. Wisconsin Cent. R. Co., 45 Wis. 543 186
Bourn v. Hart, 93 Cal. 321 199
Bowden v. York Shore Water Co., 114 Maine 150 176
Bowditch v. Boston, 101 U. S. 16 128
Bower v. Bowers, 1 Abb. Dec. (N. Y.) 214 102
Bowersock v. Smith, 243 U. S. 29 96, 199
Bowes v. Aberdeen, 58 Wash. 535 229
Bowler v. Nagel, 228 Mich. 434 199
Bowman v. Middleton, 1 Bay (S. Car.) 252 81, 87
v. Virginia State Entomologist, 128 Va. 351 87, 89, 90
v. Wathen, 42 U. S. 189 157
Boyce v. Holmes, 2 Ala. 54 80
Boyce, Ex parte, 27 Nev. 299 114
Boyce, Ex parte, 41 S. Car. 201 87
Boyd v. Bryant, 35 Ark. 69 120
v. Mills, 53 Kans. 594 116
v. Pendegast, 57 Cal. App. 504 91
v. Ritter Lumber Co., 119 Va. 348 171
v. United States, 116 U. S. 616 85
Boyett, In re, 136 N. Car. 415 88
Boynton, In re, 193 Cal. 782 90
Braceville Coal Co. v. People, 147 Ill. 66 127
Bracey v. Darst, 218 Fed. 482 151
Bradbury v. Vandalia Levee &c. Dist., 236 Ill. 36 173
Bradley v. Fallbrook Irr. Dist., 68 Fed. 948 176
v. Hammonton, 38 N. J. L. 430 198
v. Lithonia &c. R. Co., 147 Ga. 22 180
Bradshaw v. Hedrick, 294 Mo. 21 90
v. Omaha, 1 Nebr. 16 167, 171
Bradwell v. Illinois, 16 Wall. (U. S.) 130 86
Brady v. King, 53 Cal. 44 124
Bragg v. United States, 2 Ct. Cust. App. 22 144
v. Weaver, 251 U. S. 57 89, 112
Branch v. Wilmington &c. R. Co., 77 N. Car. 347 91
Brand v. Union El. R. Co., 238 U. S. 586 112
Brandenstein v. Hoke, 101 Cal. 131 167, 175
Brandon v. Umpqua Lumber &c. Co., 166 Cal. 322 145
Branson v. Bush, 251 U. S. 182 170
v. Gee, 25 Ore. 462 89
Brantley v. State, 132 Ga. 573 110
Brass v. North Dakota, 153 U. S. 391 122
Bratt v. State Ind. Acc. Commn., 236 Pac. (Ore.) 478 88
Bratton v. Chandler, 260 U. S. 110 91
Breiholz v. Board of Supervisors, 186 Iowa 1147 88
v. Board of Supervisors, 257 U. S. 118 89
Brein v. Connecticut Elec. Exam. Board (Conn.), 130 Atl. 289 91
Breitenbach v. Bush, 44 Pa. St. 313 128
Bremerton, In re, 73 Wash. 565 171, 180
Brenham v. Brenham Water Co., 67 Tex. 542 122
Brewer v. Blaugher, 14 Pet. (U. S.) 178 102
Brewer Brick Co. v. Brewer, 62 Maine 62 191
Brewster v. Rogers Co., 169 N. Y. 73 180
v. Syracuse, 19 N. Y. 116 169, 172
Brickell v. Trammell, 77 Fla. 544 112
Bridal Veil Lumbering Co. v. Johnson, 30 Ore. 205 180

[*References are to Sections.*]

Bridewell's Case, 15 Bacon's Works, 15 21, 26, 28
Bridgeport v. Housatonic R. Co., 15 Conn. 475 166, 181
Bridges v. Missouri, K. &c. R. Co., 132 Mo. App. 576 159
v. Missouri, K. &c. R. Co., 159 Mo. App. 577 159
Briggs v. Whipple, 6 Vt. 95 198
Bright v. Beard, 132 Minn. 375 128
v. Chenango County, 18 Johns. (N. Y.) 242 198
Bringard v. Stillwagon, 41 Mich. 54 88
Brinkerhoff v. Brumfield, 94 Fed. 422 89
Bristol v. Johnson, 34 Mich. 123 199
Bristol Door &c. Co. v. Bristol, 97 Va. 304 128
Brite v. Grubbs, 144 Tenn. 647 89
British-American Portland Cement Co. v. Citizens Gas Co., 255 Mo. 1 110
Broadway &c. Ferry Co. v. Hankey, 31 Md. 346 122
Brock v. Poor, 216 N. Y. 387 145
Brockenbrough v. Board of Water Commrs., 134 N. Car. 1 204
Brodhead v. Milwaukee, 19 Wis. 624 200
Brogden v. State, 18 Ala. App. 56 120
Bronx Gas & Elec. Co. v. Public Serv. Commn., 190 App. Div. (N. Y.) 13 90
v. Public Serv. Commn., 108 Misc. (N. Y.) 180 91
Brooke Elec. Co. v. Beall, 96 W. Va. 637 180
Brooks v. Brooklyn, 146 Iowa 136 195, 207
v. Dun, 51 Fed. 138 151
v. McIntyre, 4 Mich. 316 94
v. Oakland, 160 Cal. 423 89
Brooks-Scanlon Co. v. Railroad Commn., 251 U. S. 396 232
Brougham v. Kansas City, 263 Fed. 115 89
Brown v. Board of Levee Commrs., 50 Miss. 468 10, 95, 97, 110
v. Boston &c. R., 233 Tenn. 502 106
v. Chicago &c. R. Co., 137 Mo. 529 180
v. County State Road &c. Commn., 182 Wis. 480 87, 89
v. Electrical Dist. No. 2, 26 Ariz. 181 89
v. Gerald, 100 Maine 351 192, 193
v. Hummel, 6 Pa. 86 81, 88, 101
v. Keener, 74 N. Car. 714 174
v. Maryland, 12 Wheat. (U. S.) 419 113
v. Mayor of New York, 63 N. Y. 239 198
v. New Jersey, 175 U. S. 172 8, 87, 96
v. Park Cemetery, 78 N. H. 387 115, 194
v. Piper, 91 U. S. 37 213
Brown v. Powers, 134 N. W. (Iowa) 73 120
v. United States, 263 U. S. 78 203
Brown, Ex parte, 140 Fed. 461 87
Brown-Forman Co. v. Kentucky, 217 U. S. 563 107
Browning v. Collis, 21 Misc. (N. Y.) 155 112
v. Hooper, 3 Fed. (2nd) 160 171
Brown-Ketcham Iron Wks. v. Geo. B. Swift Co., 53 Ind. App. 630 142, 151
Bruce v. Gainesville (Tex. Civ. App.), 183 S. W. 41 224
Brunson v. State, 8 Okla. Cr. 665 120
Brunswick v. Litchfield, 2 Greenl. (Maine) 28 80, 82
Brunswick-Balke-Collander Co. v. Evans, 228 Fed. 991 116
Brushaber v. Union Pac. R. Co., 240 U. S. 1 108, 192
Bryan v. Birmingham, 154 Ala. 447 115
v. Board of Education, 90 Ky. 322 141, 154
v. Bullock, 84 Fla. 179 151
Brymer v. Butler Water Co., 179 Pa. St. 231 90
Bryson v. Bryson, 17 Mo. 590 104
v. Bryson, 44 Mo. 232 104
v. Campbell, 12 Mo. 498 104
Buchanan v. Warley, 245 U. S. 60 108, 127, 220
Bucher v. Fitchburg R. Co., 131 Mass. 156 116
Buchman v. State, 59 Ind. 1 124
Buckhannon River Coal Co., In re (Nebr.), 202 N. W. 616 142
Bucklew v. Central Iowa R. Co., 64 Iowa 603 96
Budd v. New York, 143 U. S. 517 122, 126
v. State, 22 Tenn. 483 101
Buffalo v. Neubeck, 209 App. Div. (N. Y.) 386 88
Buffalo &c. R. Co. v. Dudley, 14 N. Y. 336 141
Buffalo Br. Mut. Film Corp. v. Breitinger, 250 Pa. 225 114
Buffalo Refrigerating Co. v. Penn Heat & P. Co., 178 Fed. 696 151
Bulkley v. New York &c. R. Co., 27 Conn. 479 149, 159
Bull v. Butte Elec. R. Co., 69 Mont. 529 87
Bullock v. State, 65 N. J. L. 557 87
v. Yakima Valley Transp. Co., 108 Wash. 413 149
Bumberger v. Clippinger, 5 Watts. & S. (Pa.) 311 102
Bump's Estate, In re, 152 Cal. 16 88
Buncombe Tpk. Co. v. McCarson, 18 N. Car. 306 181
Bundy's Estate, In re, 44 Cal. App. 466 87
Bunkley v. Commonwealth, 130 Va. 55 91

[*References are to Sections.*]

Bunting v. Oregon, 243 U. S. 426 108, 216, 228
Bunyan v. Park Commissioners, 167 App. Div. (N. Y.) 457 202
Burch v. Newbury, 10 N. Y. 374 91, 102
Burciago v. State, 88 Tex. Cr. 576 120
Burckell v. State, 47 Tex. Civ. App. 393 120
Burckhardt v. Atlanta, 103 Ga. 302 149
Burckholter v. McConnellsville, 20 Ohio St. 308 120
Burd Orphan Asylum v. School Dist., 90 Pa. St. 21 196
Burguieres v. Sanders, 111 La. 109 174
Burke v. Gaines, 19 How. (U. S.) 388 232
Burkholder v. Union Tr. Co., 82 Mo. 572 91
Burley v. United States, 179 Fed. 1 177
Burlingame v. Thompson, 74 Kans. 393 118
Burlington v. Beasley, 94 U. S. 310 192
Burlington, C. R. &c. R. Co. v. Dey, 82 Iowa 312 90
Burlington, R. & L. Co. v. Burlington, 188 Iowa 272 149
Burnes v. Atchison, 2 Kans. 454 185
Burns v. Enid, 92 Okla. 67 122
v. Multnomah R. Co., 15 Fed. 177 88, 89
Burns, In re, 155 N. Y. 23 180
Burnside, Ex parte, 86 Ky. 423 120
Burr v. Beaver Dam Drainage Dist., 145 Ark. 51 174
Busch & Co. v. Webb, 122 Fed. 655 120
Bush v. Board of Supervisors, 159 N. Y. 212 200
v. New York Life Ins. Co., 135 App. Div. 447 139, 142
Bushnell v. Beloit, 10 Wis. 195 186
v. Leland, 164 U. S. 684 88, 90
Butler v. Dunham, 27 Ill. 474 185
v. Palmer, 1 Hill (N. Y.) 324 84, 102
v. State, 89 Ga. 821 120
Butters v. Oakland, 263 U. S. 162 170
Buttfield v. Bidwell, 192 U. S. 498 91
v. Stranahan, 192 U. S. 470 90, 91
v. United States, 192 U. S. 499 91
Byers v. Commonwealth, 42 Pa. 89 87
v. Meridian Ptg. Co., 84 Ohio St. 408 110
Byfield v. Newton, 247 Mass. 46 89, 195

C

Cabanne v. Graf, 87 Minn. 510 151
Cabell v. Cabell's Adm'r, 1 Met. (Ky.) 319 104
Cañero v. Cañero, 154 La. 1076 87
Cain v. Tyler, (Tex. Com. App.), 261 S. W. 1018 172
Cain, Ex parte, 20 Okla. 125 120
Calder v. Bull, 3 Dall. (U. S.) 386 81, 84, 104
v. Michigan ex rel., 218 U. S. 591 139
v. People, 218 U. S. 591 145
Caldwell v. Armour, 1 Penn. (Del.) 545 151
v. Justices of Burke, 4 Jones Eq. (N. Car.) 323 185
v. Prunelle, 57 Kans. 511 107
v. Sioux Falls Stockyards Co., 242 U. S. 559 151
v. Texas, 137 U. S. 692 108
v. Wilson, 121 N. Car. 425 88, 91
Caldwell, In re, 82 Nebr. 544 116
California Reduction Co. v. Sanitary Reduction Wks., 199 U. S. 306 229
Calkins v. State, 21 Wis. 501 104
Callaway v. Bohler, 291 Fed. 243 88, 89
Calor Oil & Gas Co. v. Franzell, 128 Ky. 715 180
v. Withers, 141 Ky. 489 112, 180
Calvin's Case, 4 Coke (1609) 14a 20, 21
Camas Stage Co. v. Kozer, 140 Ore. 600 114
Cameron, In re, 126 Tenn. 614 90, 91
Camfield v. United States, 167 U. S. 518 235
Camp v. Roger, 44 Conn. 291 124
Campbell v. Cook, 86 Tex. 630 96
v. Dwiggins, 83 Ind. 473 124
v. Holt, 115 U. S. 620 86, 110
v. Jackman Bros., 140 Iowa 475 120
v. Olney, 262 U. S. 352 89
v. Thomasville, 6 Ga. App. 212 120
Campbell, Ex parte, 74 Cal. 20 120
Camunas v. Porto Rico R. L. & P. Co., 272 Fed. 924 89
Canadian Country Club v. Johnson (Tex. Civ. App.), 176 S. W. 835 145
Can Pon, In re, 168 Fed. 479 91
Cantini v. Tillman, 54 Fed. 969 90, 120, 123, 203
Cantwell v. Missouri, 199 U. S. 602 216, 222, 228, 229
Capel v. Child, 2 C. & J. (Exch., 1832) 558 25
Capital City Dairy Co. v. Ohio, 183 U. S. 238 108, 231
Capital City L. & F. Co. v. Tallahassee, 186 U. S. 401 204
Capital Theater Co. v. Commonwealth, 178 Ky. 780 116
Capital Trust Co. v. Calhoun, 250 U. S. 208 91
Captain John Streator's Case, 5 Howell State Trials (1653), p. 366 21, 29
Caretta R. Co. v. Virginia-Pocahontas Coal Co., 62 W. Va. 185 180

[*References are to Sections.*]

Cargill v. Minnesota, 180 U. S. 452 122
Carleton v. Rugg, 149 Mass. 550 94
Carlson v. Sullivan, 146 Fed. 476 87
Carman v. Hickman County, 185 Ky. 630 195
Carnegie Nat. Gas Co. v. Swiger, 72 W. Va. 557 96, 97, 180
Carolina Glass Co. v. South Carolina, 240 U. S. 305 110
Carpenter v. Reliance Realty Co. 103 Mo. App. 480 114
v. Yeadon, 158 Fed. 766 115
Carr v. State, 175 Ind. 241 114, 116
Carragher, In re, 149 Iowa 225 120
Carrollton &c. R. Co. v. Lipsey, 150 Ala. 570 159
Carson v. Carson, 40 Miss. 349 104
v. Brockton Sewerage Commrs., 175 Mass. 242 88
v. Brockton Sewerage Commrs., 182 U. S. 398 168, 172
Carstens v. Fond du Lac, 137 Wis. 465 144
Carter v. Colby, 71 N. H. 230 88
v. Griffith, 179 Ky. 164 173
v. Texas, 177 U. S. 442 104
v. Tyler, 1 Call. (Va.) 165 80
Carterville Coal Co. v. Abbott, 181 Ill. 495 96
Cartwright v. Cohoes, 165 N. Y. 631 90
Casparis Stone Co. v. Industrial Board, 278 Ill. 77 106
Cass v. Dillon, 2 Ohio St. 607 181, 185
v. Morrison, 28 Minn. 257 156
Cass Farm Co. v. Detroit, 181 U. S. 396 170
Cass Township v. Dillon, 16 Ohio St. 38 200
Castner v. Minneapolis, 92 Minn. 84 199
Catholic Bishop v. Palos Park, 286 Ill. 400 114, 115
Caton v. Western Clay Drainage Dist., 87 Ark. 8 88
Cavendar v. Smith's Heirs, 5 Iowa 157 94
Cavendish, In re, 1 Anderson (c. 1587) 152 28
Cayuga County v. State, 153 N. Y. 279 198
Cedar Rapids &c. R. Co. v. Cedar Rapids, 180 Iowa 567 149
Cella Commn. Co. v. Bohlinger, 147 Fed. 419 88, 151
Cencinino, Ex Parte, 31 Cal. App. 238 114
Central &c. R. Co. v. Macon, 110 Fed. 865 91
v. Railroad Commn., 209 Fed. 75 90
v. Railroad Commn., 215 Fed. 421 90
v. Wright, 207 U. S. 127 89, 142
Central Branch U. P. R. Co. v. Smith, 23 Kans. 745 190
Central Irr. Dist. v. DeLappe, 79 Cal. 351 176
Central Land Co. v. Laidley, 159 U. S. 103 91
Central Lumber Co. v. South Dakota, 226 U. S. 157 145, 222, 227, 235
Central Pac. R. Co. v. Feldman, 152 Cal. 303 180
v. State Board of Equalization, 60 Cal. 35 110
Central R. Co. v. Elizabeth, 70 N. J. L. 578 149
Central University v. Walter's Exrs., 28 Ky. L. R. 1041 139
Chadwick v. Kelley, 187 U. S. 540 170
Chalker v. Birmingham &c. R. Co., 249 U. S. 522 107
Chambers v. Gilbert, 17 Tex. Civ. App. 106 90
Champaign County Commrs. v. Church, 62 Ohio St. 318 113
Champer v. Greencastle, 138 Ind. 339 114
Chapin v. Crusen, 31 Wis. 209 156, 157
v. Fye, 179 U. S. 127 8
Chapman v. New York, 168 N. Y. 80 199
Chappell v. United States, 160 U. S. 511 195
Chappell Chemical Co. v. Sulphur Mines Co., 172 U. S. 472 87
Charbonneau v. Nassau Elec. R. Co., 123 App. Div. 531 160
Charles v. Marion, 98 Fed. 166 88
Charles River Bridge v. Warren Bridge, 23 Mass. (6 Pick.) 376 87
v. Warren Bridge, 11 Peters (U. S.) 420 113
Charleston Nat. Gas Co. v. Low, 52 W. Va. 662 180
Charlotte, C. &c. R. Co. v. Gibbes, 27 S. Car. 385 110, 142, 159
v. Gibbes, 142 U. S. 386 142
Charlotte Harbor R. Co. v. Wells, 260 U. S. 8 112
Chase v. Proprietors, 232 Mass. 88 90
v. Trout, 146 Cal. 350 90
Chaska v. Hedman, 53 Minn. 525 190
Chastleton Corp. v. Sinclair, 264 U. S. 543 212, 214
Chattanooga v. Southern R. Co., 128 Tenn. 399 149
Chattanooga &c. R. Co. v. Evans, 66 Fed. 809 151
Cheaney v. Hooser, 48 Ky. 330 171
Cheatham v. United States, 92 U. S. 85 89
Checkley's Case, 23 Prince Soc. Pub. (1724) 1 40
Chelsea v. Treasurer &c., 237 Mass. 422 89
Cheney Bros Co. v. Massachusetts, 246 U. S. 147 142
Chenoweth v. State Board of Med. Examrs., 57 Colo. 74 91, 132
Cherokee County Pub. Co. v. Cherokee County, 48 Okla. 722 88

[*References are to Sections.*]

Chesapeake &c. Canal Co. v. Key, 3 Cranch (U. S.) 599 180
Chesapeake &c. R. Co. v. Carnahan, 118 Va. 46 47
v. Dayton, 177 Ky. 502 149
v. Maysville, 24 Ky. L. 615 149
v. Public Serv. Commn., 242 U. S. 603 149, 159
Chesapeake Stone Co. v. Moreland, 126 Ky. 656 171, 180
Chicago v. Blair, 149 Ill. 310 168, 172
v. Chicago R. Co., 282 Ill. 383 149
v. Drogasawacz, 256 Ill. 34 115
v. Gage, 268 Ill. 232 112
v. Larned, 34 Ill. 203 165
v. Lord, 277 Ill. 397 171
v. Netcher, 183 Ill. 104 222
v. O'Brien, 111 Ill. 532 124
v. Pittsburg, C., C. &c. R. Co., 242 Ill. 30 149
v. Powers, 231 Ill. 560 114
v. Schmidinger, 243 Ill. 167 115
v. Smith, 204 Ill. 356 176
v. Washingtonian Home, 289 Ill. 206 145
v. Weber, 246 Ill. 304 114
Chicago &c. R. Co. v. Averill, 224 Ill. 516 149
v. Board of Supervisors, 182 Iowa 60 89
v. Chicago Mechanics' Inst., 239 Ill. 197 180
v. Keith, 12 Ohio Cir. Dec. 208 90
v. Keith, 67 Ohio St. 279 88, 89
v. Luddington, 175 Ind. 35 149
v. Morehouse, 112 Wis. 1 180
v. Miller, 251 Ill. 58 87
v. Nye-Schneider-Fowler Co., 260 U. S. 35 91, 108
v. People, 67 Ill. 11 124
v. Pinckney, 74 Ill. 277 185
v. Railroad &c. Commn., 280 Fed. 387 91
v. State, 128 Wis. 553 142
v. Tranbarger, 238 U. S. 67 109
v. Wellman, 143 U. S. 339 125, 126
Chicago, B. &c. R. Co. v. Board of Supervisors, 182 Fed. 291 149
v. Chicago, 166 U. S. 226 80, 91, 112
v. Drainage Commn., 200 U. S. 561 149
v. Headrick, 49 Nebr. 286 91
v. Illinois, 200 U. S. 561 114, 123
v. Iowa, 94 U. S. 155 124, 148
v. Jones, 149 Ill. 361 90
v. McCooly, 273 Mo. 29 180
v. McGuire, 219 U. S. 549 96, 232
v. Nebraska, 170 U. S. 57 149
v. Otoe County, 16 Wall. (U. S.) 667 184, 185, 186
v. State, 47 Nebr. 549 97, 149
Chicago D. &c. R. Co. v. Smith, 62 Ill. 268 183, 184
Chicago Dock & Canal Co. v. Fraley, 228 U. S. 680 108, 217, 223
Chicago, I. &c. R. Co. v. Baugh, 175 Ind. 419 180
v. Hackett, 228 U. S. 559 96
v. Irons, 38 Ind. App. 196 159
Chicago, K. &c. R. Co. v. Pontius, 157 U. S. 209 96
Chicago M. &c. R. Co. v. Becker, 32 Fed. 851 90
v. Lake County, 287 Ill. 337 149
v. LeRoy, 124 Minn. 107 149
v. Milwaukee, 97 Wis. 418 149, 159
v. Minneapolis, 238 Fed. 384 149
v. Minneapolis, 232 U. S. 430 149
v. Minnesota, 134 U. S. 418 90, 125, 126
v. Railroad Commn., 204 N. W. (Wis.) 606 149
v. Tompkins, 176 U. S. 167 229
v. Wisconsin, 238 U. S. 491 160, 230
Chicago R. Co. v. Smith, 62 Ill. 268 186
Chicago, R. I. &c. R. Co. v. Cole, 251 U. S. 54 96
v. Risty, 282 Fed. 364 89
v. Stahley, 62 Fed. 363 96
v. Taylor, 79 Okla. 142 114, 145, 149
Chicago, St. P. &c. R. Co. v. Douglas County, 134 Wis. 197 145
Chicago Sanitary Dist. v. Chicago R. Co., 267 Ill. 252 114
Chicago, T. H. &c. R. Co. v. Anderson, 182 Ind. 140 114
Chicago Title & Tr. Co. v. Doyle, 259 Ill. 489 139, 142
Chicago Union T. Co. v .Chicago, 100 Ill 484 160
Children's Hospital v. Adkins, 284 Fed. 613 123
Chillicothe Rd. Co. v. Norfolk & W. R. Co., 5 Ohio App. 151 149
Chin Bak Kan v. United States, 186 U. S. 193 91
Chincleclamouche Lumber &c. Co. v. Commonwealth, 100 Pa. 438 145
Ching Jo, In re, 54 Fed. 334 89
Chin Quock Wah, Ex parte, 224 Fed. 138 91
Chin Wah, In re, 182 Fed. 256 91
Chin Yow v. United States, 208 U. S. 8 89, 90
Chipman v. Perdue, 135 Ark. 559 87
Choate v. Trapp, 224 U. S. 665 144
Chouteau v. Magenis, 28 Mo. 187 104
Choy Gum v. Backus, 239 U. S. 649 91
Christ Church v. Philadephia County, 24 How. (U. S.) 300 144
Christ Church Hospital v. Philadelphia County, 24 Pa. St. 229 144
Christy v. Elliott, 216 Ill. 31 123
Church v. Kelsey, 121 U. S 282 89
v. South Kingston, 22 R. I. 381 88, 90

[*References are to Sections.*]

Churchill v. Blackburn, Randolph (Va.) 26 32
v. Rafferty, 32 P. I. 580 114
Cincinnati v. Clinton County, 1 Ohio 77 186
v. Harth, 101 Ohio St. 344 114
v. Louisville &c. R. Co., 88 Ohio St. 283 112
v. Louisville &c. R. Co., 223 U. S. 390 112
Cincinnati, I. &c. R. Co. v. Connersville, 218 U. S. 336 112, 149
Cincinnati, N. O. &c. R. Co. v. Dungan, 162 Ky. 36 149
Cincinnati Pack. Co. v. Catlesburg, 105 U. S. 563 114
Cincinnati So. R. v. Roth, 2 Ohio App. 195 186
Cincinnati, W. &c R. Co. v. Clinton Co., 1 Ohio St. 77 181, 183, 185
Citizens' Gaslight Co. v. Louisville Gas Co., 81 Ky. 263 122
Citizens' Horse R. Co. v. Belleville, 47 Ill. App. 388 157
Citizens' Ins. Co. v. Hebert, 139 La. 708 142
Citizens' Sav. Assn. v. Topeka, 3 Dill. (U. S.) 376 189
Citizens' Sav. Bank v. Owensboro, 173 U. S. 636 144
Citizens' Tel. Co. v. Fuller, 229 U. S. 322 142
Citizens' Tr. & Guar. Co. v. Hays, 167 Ky. 560 151
City Council v. Augusta-Aiken R. & Elec. Corp., 150 Ga. 529 144
v. Baptist Church, 4 Strob. (S. Car.) 306 115
v. Birdsong, 126 Ala. 632 88
City Fire Ins. Co. v. Carrugi, 41 Ga. 660 151
Clapp v. Hartford, 35 Conn. 66 169, 172
Clarendon v. Rutland R. Co., 75 Vt. 6 149
Clark v. Clark, 10 N. H. 380 104
v. County Commrs., 69 Kans. 542 171
v. Janesville, 10 Wis. 136 186
v. Lewis, 35 Ill. 417 88
v. Louisville Water Co., 12 Ky. L. 444 144
v. Mitchell, 64 Mo. 564 110, 128
v. Nash, 198 U. S. 361 173, 176, 177, 231
v. Rochester, 13 How. Pr. (N. Y.) 204 166, 167, 181, 182
v. Tower, 104 Md. 175 120
v. United States, Fed. Cas. No. 2837 87
Clarke v. Rochester, 14 How. Pr. (N. Y.) 193 181, 182
v. Rochester, 24 Barb. (N. Y.) 446 186
Claunch v. State, 83 Tex. Cr. 382 120
Claus v. Chicago G. W. R. Co., 136 Iowa 7 159
Clay v. Clay, 56 Ore. 538 91
Clear Creek Oil & G. Co. v. Ft. Smith Spelter Co. (Ark.), 255 S. W. 903 90
Cleburne St. R. Co. v. Dickey, (Tex. Civ. App.), 168 S. W. 475 149
Clee v. Sanders, 74 Mich. 692 190
Clement v. Two Barrels of Whiskey, 136 App. Div. (N. Y.) 291 120
Clement Nat. Bank v. Vermont, 231 U. S. 120 89, 108
Clements v. Casper, 4 Wyo. 494 107
v. McCabe, 210 Mich. 207 114
Clendaniel v. Conrad, 3 Boyce (Del.) 549 171
Cleveland v. Tripp, 13 R. I. 50 172
Cleveland, C., C. &c. R. Co. v. Backus, 133 Ind. 625 97
v. Polecat Drainage Dist., 213 Ill. 83 173
v. Porter, 210 U. S. 177 88, 170
v. Schuler, 182 Ind. 57 152
Clinton v. Wilson, 257 Ill. 580 116
Close v. Glenwood Cemetery, 107 U. S. 466 140
Clough v. Verette, 79 N. H. 356 199
Clyde v. Richmond &c. R. Co., 57 Fed. 436 90
Coates v. Campbell, 37 Minn. 498 190
v. New York City, 7 Cow. (N. Y.) 585 115
Coca-Cola Co. v. Nashville Syrup Co., 200 Fed. 153 107
Cochran v. Cavanaugh (Tex. Civ. App.), 252 S. W. 284 112, 195
v. Preston, 108 Md. 220 114
v. Van Surlay, 20 Wend. (N. Y.) 365 68, 81, 100
Coffeyville Vit. Brick & Tile Co. v. Perry, 69 Kans. 297 127
Coffman v. Keightly, 24 Ind. 509 200
Cogdell v. Southern R. Co., 129 N. Car. 398 96
Cohen v. Rice (Tex. Civ. App.), 101 S. W. 1052 120
Colby v. Equitable Trust Co., 192 N. Y. 535 110, 146
Cole v. Hall, 103 Ill. 30 159
v. LaGrange, 113 U. S. 1 176, 190
v. State, 102 N. Y. 48 198
Coleman v. Glenn, 103 Ga. 458 88
v. Spring Constr. Co., 41 Cal. App. 201 89
Coler v. Brooklyn Daily Eagle, 133 App. Div. (N. Y.) 300 87
Coles v. Washington, 35 Minn. 124 199
Coley v. North Carolina R. Co., 129 N. Car. 407 96
Colfax Highway v. East Lake Fk. Drain Dist., 127 Ill. 581 173
Colgate v. United States Leather Co., 73 N. J. Eq. 72 139
v. United States Leather Co., 75 N. J. Eq. 229 139
Collector of Taxes v. Rising Sun St. L. Co., 229 Mass. 494 142

[*References are to Sections.*]

College Arms Hotel Co. v. Atlantic Coast Line, 61 Fla. 550 149
College Hill Land Assn., In re, 157 Cal. 596 141
Collier v. Union R. Co., 113 Tenn. 96 180
Collins v. American Exch. Nat. Bank, 147 Ga. 273 151
v. Society for Relief of Decayed Pilots, 73 Pa. 194 142
v. State (Tex. Cr. App.), 60 S. W. 42 104
v. Wilber, 173 Ind. 361 178
Collins, In re, 188 Cal. 701 90
Colon v. Lisk, 13 App. Div. (N. Y.) 195 89
Colorado &c. R. Co. v. King, 51 Colo. 181 159
v. State R. Commn., 54 Colo. 64 149
Colorado Farm & L. S. Co. v. Beerbohm, 43 Colo. 464 144
Colorado Postal Tel. Co. v. Colorado Springs, 61 Colo. 560 145
Columbia v. Shaw, 131 S. Car. 462 91
Columbia Del. Bridge Co. v. Geisse, 35 N. J. L. 558 157
Columbia Levee Co. v. Meier, 39 Mo. 53 175
Columbia Tr. Co. v. Lincoln Inst., 138 Ky. 804 154
Columbus Packing Co. v. State, 106 Ohio St. 469 90
Colvill v. Fox, 51 Mont. 72 88, 90
Colver v. Skeffington, 265 Fed. 17 91
Comer v. Folsom, 13 Minn. 219 200
Comins v. Eddington, 64 Maine 65 200
Commerce Commn. v. Cleveland, C., C. &c. R. Co., 309 Ill. 165 88, 149
Commercial Bank v. Chambers, 16 Miss. 9 80
Commercial Club v. Chicago, St. P. M. &c. R. Co., 142 Minn. 169 149
Commercial Nat. Bank v. Iola, 2 Dill. (U. S.) 353 189
v. Jordan, 71 Fla. 566 151
Commercial Trust Co. v. Hudson County, 87 N. J. L. 179 142
Commissioners v. Seabrook, 2 Strob. (S. Car.) 560 87
Commissioners of Lincoln Park v. Fahrney, 250 Ill. 256 112
Common Council v. Morris, 201 Ky. 449 149
Commonwealth v. Abrahams, 156 Mass. 57 123
v. Aiken, 64 Pa. Super. Ct. 96 128
v. Albro, 1 Gray (67 Mass.) 1 90
v. Alderman, 275 Pa. 483 120
v. Alger, 7 Cush. (Mass.) 53 113, 114, 117, 129
v. Avery, 77 Ky. 625 91
v. Barker, 211 Pa. St. 610 195, 199
Commonwealth v. Bearse, 132 Mass. 542 114
v. Blackington, 41 Mass. 352 103
v. Bonsall, 3 Whart. (Pa.) 559 137
v. Boston & N. St. R. Co., 212 Mass. 82 148, 160
v. Burk's Springs Distill. Co., 137 Ky. 224 120
v. Caldwell, 14 Mass. 330 116
v. Charity Hospital, 198 Pa. 270 115
v. Clearview Coal Co., 256 Pa. 328 195
v. Connecticut Valley St. R. Co., 196 Mass. 309 160
v. Connelly, 163 Mass. 539 219
v. Duane, 1 Binney (Pa.) 601 80, 82
v. Eastern R. Co., 103 Mass. 254 149
v. Emmers, 221 Pa. 298 91
v. Essex Co., 13 Gray (Mass.) 239 160
v. Fayette Co. R. Co., 55 Pa. 452 144
v. Fowler, 96 Ky. 166 120
v. Francies, 250 Pa. 496 96
v. Goding, 44 Mass. (3 Metc.) 130 118
v. Hana, 195 Mass. 262 106
v. Has, 122 Mass. 40 116, 219
v. Henry, 110 Va. 879 120, 123
v. Hock Age Mut. Ben. Assn., 10 Phila., Pa., 554 147, 163
v. International Harvester Co., 131 Ky. 551 221
v. Jacobson, 183 Mass. 242 218, 233
v. Johnson, 78 Ky. 509 104
v. Kendall, 12 Cush. (Mass.) 414 88, 115
v. Kinsley, 133 Mass. 578 91, 118
v. Klein, 81 Pa. Super. Ct. 551 120
v. Libbey, 216 Mass. 356 114
v. Louisville &c. R. Co., 80 Ky. 291 116
v. Louisville &c. R. Co., 112 Ky. 783 149
v. McArthur, 152 Mass. 552 115
v. McDonough, 13 Allen (Mass.) 581 120
v. McWilliams, 11 Pa. 61 181
v. Marsh, 14 Pa. Co. Ct. Rep. 369 152
v. Maxwell, 271 Pa. 378 104
v. Milton, 51 Ky. 212 142
v. Mortgage Trust Co., 227 Pa. 163 142
v. Murphy, 76 Mass. 1 120
v. Myer, 92 Va. 809 107
v. Nesbit, 34 Pa. 398 116
v. Nickerson, 236 Mass. 281 120
v. Painter, 10 Barr. (Pa.) 214 88

[*References are to Sections.*]

Commonwealth v. Pear, 183 Mass. 242 128, 218, 219
v. Philadelphia &c. R. Co., 164 Pa. 252 144
v. Philadelphia, H. &c. R. Co., 23 Pa. Super. Ct. 205 149
v. Pittsburgh &c. R. Co., 58 Pa. 26 145
v. Plymouth Coal Co., 232 Pa. St. 141 88, 114
v. Reinecke Coal Min. Co., 117 Ky. 885 152
v. Richmond &c. R. Co., 81 Va. 355 144
v. Rothermel, 27 Pa. Super. Ct. 648 116
v. Rowe, 218 Pa. 168 128
v. Sharon Coal Co., 164 Pa. St. 284 142
v. Simons, 15 Pa. Co. Ct. Rep. 551 107
v. Sisson, 189 Mass. 247 90
v. Smith, 163 Ky. 227 120
v. Snyder, 182 Pa. St. 630 107
v. United Cigarette Mach. Co., 120 Va. 835 89
v. United States Worsted Co., 220 Mass. 183 139
v. Vrooman, 164 Pa. St. 306 123
v. Walton, 182 Pa. St. 373 195, 199
v. Wasson, 3 Cr. Law Mag. (Pa.) 726 124
v. Wells (Ky. App.), 244 S. W. 675 120
v. Wormser, 67 Pa. Super. Ct. 444 114
Commonwealth Farm L. Co. v. Caudle, 203 Ky. 761 151
Community Chautauquas Inc. v. Caverly, 244 Fed. 893 145
Compton Co. v. Allen, 216 Fed. 537 151
Concord & M. R. R. v. Boston & M. R. R., 67 N. H. 464 149
Concord & P. R. R. v. Portsmouth, 64 N. H. 218 149
Concord R. R. v. Greely, 17 N. H. 47 180, 181
Condemnations for Impr. of Rouge Riv., In re, 266 Fed. 105 89, 180
Condon v. Forest Park, 278 Ill. 218 114
Conger v. Pierce County, 116 Wash. 27 114
Connecticut College v. Calvert, 87 Conn. 421 193, 195, 196
Connecticut Co. v. Stamford, 95 Conn. 26 114
Connecticut Light & P. Co. v. Southbury, 95 Conn. 98 112
Connecticut Mut. Life Ins. Co. v. Spratley, 99 Tenn. 322 151
v. Spratley, 172 U. S. 602 142
Connolly v. Union Sewer Pipe Co., 184 U. S. 540 222, 223
Conover v. West Jersey Mfg. Co., 87 N. J. Eq. 16 88, 90
Considine, In re, 83 Fed. 157 123
Consolidated Enterprises v. State, 150 Tenn. 148 116
Consolidated Gas Co. v. Mayer, 146 Fed. 150 88
Consolidated Gas Co., Matter of, 56 Misc. (N. Y.) 49 139
Consolidated Rendering Co. v. Vermont, 207 U. S. 541 88
Constantin Refining Co. v. Day, 147 La. 623 142
Consumers' Lignite Co. v. Grant, 181 S. W. (Tex. Civ. App.) 202 96
Continental Ins. Co. v. United States, 259 U. S. 156 153
Converse, In re, 137 U. S. 624 91, 123
Conwell v. Emrie, 2 Ind. 35, 90, 128
Cook v. South Park Comrs., 69 Ill. 115 112
Cooke v. United States, 267 U. S. 517 87, 89
Coombs, Ex parte, 169 Cal. 484 120
Cooper v. Board of Works, 14 C. B. (N. S.) (C. P., 1863) 180 25
v. Ft. Smith &c. R. Co., 23 Okla. 139 151
v. Schultz, 32 How. Pr. (N. Y.) 107 87
v. State, 64 Md. 40 104
v. Telfair, 4 Dall. (U. S.) 14 81
Copeland v. Copeland, 73 Okla. 252 102
v. United Shoe Mach. Co., 84 N. J. Eq. 276 139
v. Wheelwright, 230 Mass. 131 90
Coppage v. Kansas, 236 U. S. 1 127, 220
Corinth v. Crittenden, 94 Miss. 41 118
Corkran Oil & D. Co. v. Arnaudet, 199 U. S. 182 8
Corliss v. Richford, 85 Vt. 85 89
Corneli v. Moore, 257 U. S. 491 120
Cornelius v. Glen, 7 Jones L. (52 N. Car.) 512 160
Corporation Commn. v. Seaboard Air Line Co., 161 N. Car. 270 149
v. Southern R. Co., 185 N. Car. 435 119
Corry v. Baltimore, 196 U. S. 466 89
Corvalis Creamery Co. v. Van Winkle, 274 Fed. 454 123
Cosgriff v. Craig, 195 N. Y. 190 87
Coster v. Tide Water Co., 18 N. J. Eq. 54 166, 167, 173
Cotten v. Ellis, 52 N. Car. 545 82
Cotting v. Godard, 183 U. S. 79 90
v. Kansas City Stock Yds. Co., 79 Fed. 679 122
v. Kansas City Stock Yds. Co., 183 U. S. 79 108
Cotton v. County Comrs., 6 Fla. 610 185
v. Wiscasset, W. &c. R. Co., 98 Maine 511 159
Cottrell v. Chicago, T. H. &c. R. Co., 192 Ind. 692 180
Cottrill v. Myrick, 12 Maine 222 160

[*References are to Sections.*]

Cotulla La Salle Water S. Co. (Tex. Civ. App.), 153 S. W. 711 177
Couch v. Jeffries, 4 Burrows (1769) 2460 25, 82
Council Bluffs v. Illinois Cent. R. Co., 158 Iowa 679 149
County Comrs. v. Baltimore &c. R. Co., 113 Md. 179 149
Courier Journal Job Ptg. Co. v. Anderson, 159 Ill. App. 32 151
Courtin, In re, 150 La. 624 87
Covington v. Kentucky, 173 U. S. 231 185
v. Southgate, 54 Ky. 491 171
Covington & L. Tpk. Rd. v. Sandford, 164 U. S. 578 139
Cowles v. Britain, 9 N. Car. 204 90
v. New York, N. H. &c. R. Co., 80 Conn. 48 149
Cox v. Revelle, 125 Md. 579 202
v. Wood, 247 U. S. 3 128
Coyle v. Smith, 221 U. S. 559 145
Cozad v. Kanawha Hardwood Co., 139 N. Car. 283 180
Craig v. Philadelphia, 89 Pa. 265 124
Crain v. United States, 162 U. S. 625. 96
Crall v. Poso Irr. Dist., 87 Cal. 140 176
Crane v. Campbell, 245 U. S. 304 120
v. Hahlo, 258 U. S. 142 89, 91, 94, 96
v. Meginnis, 1 Gill & J. (Md.) 463 104
Crane, In re, 26 Cal. App. 22 152
Crane Co. v. Looney, 218 Fed. 260 142
Crawford, Ex parte, 165 Fed. 830 91
Crawfordsville v. Braden, 130 Ind. 149 204, 205
Crawfordsville Trust Co. v. Ramsey, 178 Ind. 258 87
Creaghan v. Baltimore, 132 Md. 442 91
Crease v. Babcock, 23 Pick. (Mass.) 334 145, 146
Creekmore v. Commonwealth, 11 Ky. L. 566 120
Crescent City Gaslight Co. v. New Orleans Gaslight Co., 27 La. Ann. 138 122
Croft v. Bennington &c. R. Co., 64 Vt. 1 89
Cromwell's Case, Lord, 4 Coke (1578) 12 19, 20
Cronin v. Adams, 192 U. S. 108 120
Cronise v. Cronise, 54 Pa. 255 104
Crooks v. Tazewell Co., 263 Ill. 343 96
Crookshank, Ex parte, 269 Fed. 980 120
Crosland v. Dyson, 280 Fed. 105 120
Cross v. West Virginia, C. &c. R. Co., 35 W. Va. 174 140
Crosse v. La Crosse Gas & Elec. Co., 145 Wis. 408 157
Crouse, Ex parte, 4 Whart. (Pa.) 9 87
Crowell v. Hopkinton, 45 N. H. 9 200
Crowley v. Christensen, 137 U. S. 86 120
Crowley, Ex parte, 268 Fed. 1016 87
Crystal Ice & Mfg. Co. v. State, 23 Tex. Civ. App. 293 153
Crystal Park Co. v. Morton, 27 Colo. App. 74 171
Cullen v. Carthage, 103 Ind. 196 198
Cullinan, Matter of, 82 App. Div. (N. Y.) 445 110
Cullins v. Williams, 156 Ky. 57 91
Cullman v. Arndt, 125 Ala. 581 107
Cullman County v. Vincennes Bridge Co., 251 Fed. 473 151
Cumberland &c. R. Co. v. Barren County Ct., 73 Ky. 604 154
Cumberland Glass Mfg. Co. v. State, 58 N. J. L. 224 152
Cumberland Tel. & T. Co. v. Railroad & Pub. Util. Commn., 287 Fed. 406 90
Cunmings v. Chicago &c. R. Co., 189 Ill. 608 91
v. Hyatt, 54 Nebr. 35 176
v. Lobsitz, 42 Okla. 704 128
v. Missouri, 4 Wall. (U. S.) 277 116
v. Peters, 56 Cal. 593 173
v. White Mt. R., 43 N. H. 114 94
Cunningham v. Northwestern Imp. Co., 44 Mont. 180 96
v. Ponca City, 27 Okla. 858 172
Cunnius v. Reading School Dist., 198 U. S. 458 123
Cureton v. State, 135 Ga. 660 120
Curran v. Arkansas, 15 How. (U. S.) 304 138, 146
Curtis v. Whipple, 24 Wis. 350 195
Cusack Co. v. Chicago, 242 U. S. 526 228
Cushman v. Warren-Scharf A. P. Co., 220 Fed. 857 145
Cutsinger v. Atlanta, 142 Ga. 555 91
Cutting v. Taylor, 3 S. Dak. 11 199
Cuyahoga River P. Co. v. Akron, 240 U. S. 462 87
Cypress Pond Drain Co. v. Hooper, 59 Ky. 350 173

D

Dabbs v. Hernken, 3 Rob. (La.) 123 87
Daedler, In re, 194 Cal. 320 87
Daggett v. Colgan, 92 Cal. 53 195
Dahlgard v. Florida Dev. Corp., 187 Ill. App. 282 140
Dahnke-Walker Mill. Co. v. Bondurant, 257 U. S. 282 232
Daily v. Swope, 47 Miss. 367 169, 175
Dale v. Marvin, 76 Ore. 528 89
Dale Manor, Jenkins (Exch. 1509) 196, pl. 4 20

[*References are to Sections.*]

Dallas v. Allen (Tex. Civ. App.), 40 S. W. 324 128
v. Atkins (Tex. Civ. App.), 197 S. W. 593 87
v. Bergfield (Tex.), 245 S. W. 749 89
v. Fosdick, 40 How. Pr. (N. Y.) 249 103
Dallas Cotton Mills v. Industrial Co. (Tex. Civ. App.), 252 S. W. 821 112
Dallas County v. Thornley, 140 Iowa 355 87
Dane v. Jackson, 237 Mass. 50 108
v. Jackson, 256 U. S. 589 108
Daniel v. Richmond, 78 Ky. 542 107
Daniels v. Detroit, G. H. &c. R. Co., 163 Mich. 468 142
Darby's Case, 3 Wheeler Cr. Cas. (N. Y.) 1 87
Darcantel v. People's Slaughter House & R. Co., 44 La. Ann. 632 122
Darling v. Gunn, 50 Ill. 424 89
Darmstatter v. Passaic, 81 N. J. L. 162 91
Darnell v. Indiana, 226 U. S. 390 142
Dart v. Houston, 22 Ga. 506 139
Dartmouth College v. Woodward, 1 N. H. 111 79
v. Woodward, 65 N. H. 473 83, 88
v. Woodward, 4 Wheat. (U. S.) 518 84, 93, 113, 135, 136
Dash v. Van Kleeck, 7 Johns. (N. Y. Ch.) 477 80
Davenport v. Kleinschmidt, 6 Mont. 502 122
Davenport Gas & Elec. Co. v. Davenport, 124 Iowa 22 122
David Lupton's Sons Co. v. Automobile Club, 225 U. S. 489 151
Davidow v. Wadsworth Mfg. Co., 211 Mich. 90 152
Davidson v. Farrell, 8 Minn. 258 95
v. Hartford Life Ins. Co., 151 Mo. App. 561 89
v. New Orleans, 96 U. S. 97 2, 76, 86, 88, 89, 97, 112, 122, 124, 134, 165, 169, 174, 180
Davies v. State, 27 Ohio Cir. Ct. 593 196
Davies, In re, 168 N. Y. 89 153
Davis v. Burk, 179 U. S. 403 96
v. Calderwood (Mass.), 146 N. E. 708 88, 91
v. Florida Power Co., 64 Fla. 246 221
v. Gaines, 48 Ark. 370 175
v. Massachusetts, 167 U. S. 43 123
v. Menasha, 21 Wis. 491 94
v. Moore, 130 Ark. 128 147, 151
v. Pierse, 7 Minn. 13 116
v. State, 68 Ala. 58 123
v. State, 3 Lea (Tenn.) 376 106
v. State, 35 Tex. 118 87
Davis v. Twin Mountain &c. R. Co., 77 W. Va. 400 149
Davis, Ex parte, 86 Tex. Cr. 168 120
Davis Coal Co. v. Polland, 158 Ind. 607 96
Dawes, Ex parte (Okla. Cr.), 239 Pac. 689 89
Dawson v. Dawson Tel. Co., 137 Ga. 62 148
v. Horan, 51 Barb. (N. Y.) 459 87
v. Kuttner, 48 Ga. 133 128
Day v. Dunkirk, 86 Misc. (N. Y.) 266 89
v. Savage, 2 Hobart (1615) 85 20, 48
Dayton Coal & I. Co. v. Barton, 183 U. S. 23 152
Dayton-Goose Creek R. Co. v. United States, 63 U. S. 456 90
Deal v. Mississippi County, 107 Mo. 464 191
v. St. Louis, I. M. &c. R. Co., 144 Mo. App. 684 159
Deaton v. Commonwealth, 157 Ky. 308 91
Deblois v. Barker, 4 R. I. 445 88
Debolt v. Ohio Life Ins. & Tr. Co., 1 Ohio St. 563 136
Debs v. United States, 249 U. S. 211 128
Decie v. Brown, 167 Mass. 290 120
Deems v. Baltimore, 80 Md. 164 88, 90
Deerfield River Co. v. Wilmington Power Co., 83 Vt. 548 193
Deering & Co. v. Peterson, 75 Minn. 118 197
De Francesco v. Piney Min. Co., 76 W. Va. 756 96
De Funiak Springs v. Louisville &c. R. Co., 81 Fla. 27 149
Degge v. Hitchcock, 229 U. S. 162 110
Deibeikis v. Link-Belt Co., 261 Ill. 454 96
Delaney v. Plunkett, 146 Ga. 546 120
Delaware, L. &c. R. Co. v. Board of Pub. Util. Comrs., 85 N. J. L. 28 142, 146, 148, 160
v. East Orange, 41 N. J. L. 127 149
v. Van Santwood, 216 Fed. 252 149
Delaware R. Co. v. Tharp, 5 Harr. (Del.) 454 145
Delmar Jockey Club v. Missouri, 210 U. S. 324 91
Deloria v. Atkins, 158 Mich. 232 151
Delta v. Charlesworth, 64 Colo. 216 120
De Motte v. Valparaiso, 161 Ind. 319 204
Denham v. Bristol, 108 Mass. 202 171
Denny v. Mattoon, 2 Allen (Mass.) 361 101

[*References are to Sections.*]

Dent v. West Virginia, 129 U. S. 114 96, 108, 126
Denver v. Frueauff, 39 Colo. 20 217
v. Hobbs' Estate, 58 Colo. 220 142
v. Hubbard, 17 Colo. App. 346 122
v. New York Tr. Co., 229 U. S. 123 204
Denver &c. R. Co. v. Ryan, 17 Colo. 98 149
Deposit Bank v. Daviess, 102 Ky. 174 144
Deppe v. Chicago, R. I. &c. R. Co., 36 Iowa 52 96
Derby v. Framingham &c. R. Co., 119 Mass. 516 159
Des Moines v. Manhattan Oil Co., 193 Iowa 1096 88, 114, 123
Des Moines & M. L. Dist. v. Chicago, B. &c. R. Co., 240 Mo. 614 175
Des Moines City R. Co. v. Des Moines, 152 Iowa 18 149
Detamore v. Hindley, 83 Wash. 322 149
Detroit v. Detroit &c. R. Co., 43 Mich. 140 154, 157, 160
v. Parker, 181 U. S. 399 88, 170
Detroit, In re, 163 Mich. 229 149
Detroit & M. R. Co. v. Fletcher Paper Co., 248 U. S. 30 90
Detroit Mortgage Corp. v. Vaughan, 211 Mich. 320 142
Detroit United R. Co. v. Detroit, 248 U. S. 429 160
De Vane v. Bauman, 82 Fla. 346 91
Devere v. Delaware L. &c. R. Co., 60 Fed. 886 151
Dewey v. Atlantic Coast Line, 142 N. Car. 392 149
De Witt v. State, 108 Ohio St. 513 91
De Young v. Koehler, 181 Wis. 415 90
Diamond Glue Co. v. United States Glue Co., 103 Fed. 838 151
Dibrill v. Coleman (Tex.), 172 S. W. 550 88
Dice v. Sherman, 107 Va. 424 187
Dickerson v. Tri-County Drainage Dist., 138 Ark. 471 89, 173
Dickinson v. Cunningham, 140 Ala. 527 122
Dietz v. Big Muddy Coal & I. Co., 263 Ill. 480 96
Digges's Lessee v. Beale, 1 H. & McH. (Md.) 67 41
Dillon v. Kansas City, Ft. S. &c. R. Co., 67 Kans. 687 180
Dingley v. Boston, 100 Mass. 544 202
Dingman v. People, 51 Ill. 277 147
Dinsmore v. New York Board of Police, 12 Abb. N. Cas. (N. Y.) 436 116
Directors of M. L. Dist. No. 2 v. Prairie Pipe L. Co., 292 Fed. 474 107
Dirken v. Great Northern Paper Co., 110 Maine 374 123, 145
District of Columbia v. Brooke, 214 U. S. 138 108
v. Capital Trac. Co., 41 App. D. C. 115 148, 154, 160
v. Metropolitan R. Co., 8 App. D. C. 322 149
v. Washington & G. R. Co., 4 Mackey (15 D. C. 214) 149
Ditberner v. Chicago, M. &c. R. Co., 47 Wis. 138 96, 103
Dittman Boot & Shoe Co. v. Mixon, 120 Ala. 206 91
Dobbins v. Los Angeles, 195 U. S. 223 230
Doctor v. Hartman, 74 Ind. 221 171
Dr. Bonham's Case, 8 Coke (1609) 115 20, 32
Dodd v. Hart, 8 Del. Ch. 448 88
v. Lyon, 49 N. J. L. 229 104
Dodge v. Mission Tp., 107 Fed. 827 179, 190
v. United States, 258 Fed. 300 128
Doherty v. Toledo Ry. & L. Co., 254 Fed. 597 90
Dolbeer's Estate, In re, 153 Cal. 652 87
Dolph, In re, 17 Colo. 35 96
Dominion Hotel v. Arizona, 249 U. S. 265 216, 224, 228
Donald v. Philadelphia &c. Coal & I. Co., 241 U. S. 329 142
v. Scott, 67 Fed. 854 203
Donnellan, In re, 49 Wash. 460 116
Donnelly v. Longport, 88 N. J. L. 68 175
Donough's Appeal, 86 Pa. 306 195, 196
Donovan v. Hannibal &c. R. Co., 89 Mo. 147 159
v. Vicksburgh, 29 Miss. 247 88
Dorchy v. Kansas, 264 U. S. 286 131
Dorman v. State, 34 Ala. 216 10, 120
Dornhoefer v. Farley, 161 App. Div. (N. Y.) 600 91
Dorris Motor Co. v. Colburn, (Mo.), 270 S. W. 339 91
Dorsey, In re, 7 Porter (Ala.) 293 10, 93, 98, 116
Dotson v. Atchison, T. &c. R. Co., 81 Kans. 816 180
Dougherty, In re, 27 Vt. 325 87, 120
Dow v. Beidelman, 125 U. S. 680 108, 125, 126, 148, 162
v. Northern Railroad, 67 N. H. 1 141
Dowda v. State, 203 Ala. 441 120
Dowdell v. United States, 221 U. S. 325 96
Downing v. Indiana State Bd. of Agri., 129 Ind. 443 195
Doyle v. Continental Ins. Co., 94 U. S. 535 142, 145

[References are to Sections.]

Doza, Ex parte, 13 Okla. Cr. 287 87
Drainage Along Pequest River, In re, 41 N. J. L. 175 174
Drainage Dist. No. 2 v. Extension Ditch Co., 32 Idaho 314 89
Drainage Dist. No. 7 v. Bernards, 89 Ore. 531 89, 173
Drainage of Lands, In re, 35 N. J. L. 497 173
Drake v. Drake, 15 N. Car. 110 102
Dred Scott v. Sandford, 19 How. (U. S.) 393 63, 71, 121, 122
Dreyfus v. Boone, 88 Ark. 353 122
Driggs v. State, 52 Ohio St. 37 120
Dronberger v. Reed, 11 Ind. 420 171, 181
Dryfoos v. Edwards, 284 Fed. 596 120
Du Bose v. Levee Comrs., 11 La. Ann. 165 175
Dubuque &c. R. Co. v. Ft. Dodge, D. M. &c. R. Co., 146 Iowa 666 180
Dubuque County v. Dubuque &c. R. Co., 4 G. Greene (Iowa) 1 182
Ducat v. Chicago, 10 Wall. (U. S.) 410 142
Duffield v. Smith, 3 Serg. & R. (Pa.) 590 80
v. Williamsport School Dist., 162 P. St. 476 128
Dugger v. Mechanics & T. Ins. Co., 95 Tenn. 245 106
Duke v. Force, 120 Wash. 599 147, 151
v. Metropolitan St. R. Co., 166 Mo. App. 121 160
v. O'Bryan, 100 Ky. 710 174
Dukick v. Blair, 3 Fed. (2d) 302 88, 89
Dullam v. Willson, 53 Mich. 392 91
Duluth &c. R. Co. v. St. Louis Co., 179 U. S. 302 144
Duluth St. R. Co. v. Railroad Commn., 161 Wis. 245 148
Dunbar v. Augusta, 90 Ga. 390 128
v. Ayuntamiento, 1 Cal. 355 128
Duncan v. Baltimore &c. R. Co., 68 W. Va. 293 91
v. Missouri, 152 U. S. 377 108
Dunlop v. Mercer, 156 Fed. 545 151
Dunne v. People, 94 Ill. 120 104
Duquesne v. Fincke, 269 Pa. 112 123
Durand v. Dyson, 271 Ill. 382 123, 128, 224
v. New Haven & N. Co., 42 Conn. 211 159
Durein v. State, 208 U. S. 613 120
Durfee v. Old Colony &c. R. Co., 5 Allen (Mass.) 230 141
Durham v. Durham Pub. Serv. Co., 182 N. Car. 333 149
v. Eno Cotton Mills, 141 N. Car. 615 123
v. Lewiston, 4 Maine 140 104
v. Southern R. Co., 185 N. Car. 240 149
Durkee v. Janesville, 28 Wis. 464 11, 104, 110
Durkin v. Kingston Coal Co., 171 Pa. St. 193 127
Durrant, In re, 84 Fed. 317 91
Dwyer v. Chicago &c. R. Co., 40 S. Dak. 84 149
v. Chicago &c. R. Co., 41 S. Dak. 535 159
Dyar v. Farmington Village Corp., 70 Maine 515 185
Dyer v. Baltimore, 140 Fed. 880 89
v. Woods, 166 Ind. 44 172
Dyre's Case, 3 N. Y. Col. Docs. (1680) 289 44

E

Eagan v. Lynch, 3 Civ. Proc. (N. Y.) 236 87
Eagle Ins. Co. v. Ohio, 153 U. S. 446 147
Eagleson v. Rubin, 16 Idaho 92 110
Eakin v. South Dakota State Cement Commn., 44 S. Dak. 268 208
Eales v. Barbourville, 177 Ky. 216 107
Earle v. Commonwealth, 180 Mass. 579 199
East Bottoms Drainage & L. Dist., In re, 305 Mo. 577 172, 174
East Canada Creek Elec. L. Co., In re, 49 Misc. (N. Y.) 565 193
Eastern Oregon Land Co. v. Willow River L. & I. Co., 204 Fed. 516 177
East Hartford v. Hartford Bridge Co., 17 Conn. 79 157
East Kingston v. Towle, 48 N. H. 57 81, 82, 88
Eastman v. Dole, 213 Ill. App. 684 91
v. Jennings, 69 Ore. 1 91
East Prairie v. Greer (Mo. App.), 186 S. W. 952 120
East Saginaw Mfg. Co. v. East Saginaw, 19 Mich. 259 191
East Tennessee Brew. Co. v. Currier, 126 Tenn. 535 89, 90
East Tennessee, V. &c. R. Co. v. Pickerd, 24 Fed. 614 144
Eberle v. Michigan, 232 U. S. 700 120
Eberle, In re, 98 Fed. 295 107
Eckart v. Ft. Wayne &c. Trac. Co., 181 Ind. 352 180
Eckerson v. Des Moines, 137 Iowa 452 224
Eckert v. Perth Amboy &c. R. Co., 65 N. J. Eq. 777 149
Eddleman v. Union County Trac. & P. Co., 217 Ill. 409 180
Eden v. People, 161 Ill. 296 214
Edgar v. McDonald (Tex. Civ. App.), 106 S. W. 1135 120
Edgar A. Levy Leasing Co. v. Siegel, 258 U. S. 242 90
Edge v. Holcomb, 135 Ga. 765 91
v. State (Tex. Cr.), 275 S. W. 1010 120

[*References are to Sections.*]

Edmond's Estate, In re, 154 Ill. App. 357 87
Edmondson v. Dyson, 7 Ga. 512 102
Edwards v. Cheyenne, 19 Wyo. 110 87
v. Kearzey, 96 U. S. 595 128
Edwards County v. Jennings, 89 Tex. 618 122
Edwardsville v. Illinois Bell Tel. Co., 310 Ill. 618 90, 106
Egan v. Knewel, 298 Fed. 784 96
Egyptian Levee Co. v. Hardin, 27 Mo. 495 169, 175
Ehlers v. Stoeckle, 37 Mich. 261 110
Ehrhardt v. Robertson Bros., 78 Mo. App. 404 142, 151
Eidge v. Bessemer, 164 Ala. 599 120
Eight Hour Bill, In re, 21 Colo. 29 127
Eikenberry v. Edwards, 71 Iowa 82 94
v. St. Paul &c. R. Co., 174 Iowa 6 180
Eilenbecker v. Plymouth County, 134 U. S. 31 87, 94, 120
Einstein v. Raritan Woolen Mills, 74 N. J. Eq. 624 139, 140
Ekern v. McGovern, 154 Wis. 157 88, 91, 94, 97, 98
Ekin v. United States, 142 U. S. 651 91
Elder v. State, 162 Ala. 41 120
Eldridge v. Trezevant, 160 U. S. 452 169, 175
Electric Imp. Co. v. San Francisco, 45 Fed. 593 123
Elgin v. Winchester, 300 Ill. 214 107
Eliopolo v. Stubbs, 143 Ga. 602 120
Ellinghouse v. Taylor, 19 Mont. 462 177
Elliott v. Wille, 112 Nebr. 78 180
Elliott's Executors v. Lyell, 3 Call. (Va.) 268 80, 82
Ellis v. Frazier, 38 Ore. 462 142
v. Northern Pac. R. Co., 77 Wis. 114 186
Ellsworth, Ex parte, 165 Cal. 677 120
El Paso &c. R. Co. v. Gutierrez, 215 U. S. 87 96
Elston v. Piggott, 94 Ind. 14 94
Ely v. Thompson, 10 Ky. 70 87, 88, 99
Elyrie v. Lake Shore, &c. R. Co., 23 Ohio Cir. Ct. 482 149
Embree v. Kansas City &c. Road Dist., 240 U. S. 242 170
Emerich v. Bourland, 156 Ark. 495 176
Emerson v. Hall, 13 Pet. (U. S.) 409 198
Emery v. Chicago, M. &c. R. Co., 35 S. Dak. 583 112
Empire City Bank, Matter of 18 N. Y. 199 87
Empire Min. Co. v. Bowers, 202 Ala. 85 89
Employers' Liability Cases, 207 U. S. 463 96
Emporia v. Atchison, T. &c. R. Co., 88 Kans. 611 160
Enderman v. Ashby, 2 Ky. 53 87
Endicott-Johnson Corp. v. Encyclopedia Press, 266 U. S. 285 97
Enfield Toll Bridge Co. v. Hartford &c. R. Co., 17 Conn. 40 122
Englewood v. Denver &c. R. Co., 248 U. S. 294 148
English v. New Haven & N. Co., 32 Conn. 240 149
v. People, 96 Ill. 566 190
v. Richardson, 224 U. S. 680 144
Enos v. Hanff, 98 Nebr. 245 145
Eno's Estate, In re, 202 App. Div. (N. Y.) 739 87
Eno's Will, In re, 94 Misc. (N. Y.) 100 87
Ensign v. Pennsylvania, 227 U. S. 592 8
Enterprise Ditch Co. v. Moffit, 58 Nebr. 642 151
Equitable Life Assur. Co. v. Hart, 55 Mont. 76 142
Equitable Loan &c. Co. v. Edwardsville, 143 Ala. 182 120
Erickson v. Cass County, 11 N. Dak. 494 89
Erie &c. R. Co. v. Casey, 26 Pa. 287 146, 153, 154, 156, 157
Erie R. Co. v. Board of Pub. Util. Comrs., 90 N. J. L. 271 149
v. Board of Pub. Util. Comrs., 254 U. S. 394 149
v. Public Serv. Commn., 271 Pa. 409 149, 180
v. State, 31 N. J. L. 531 143
v. Williams, 233 U. S. 685 152, 227
Ervine's Appeal, 16 Pa. 256 81, 88, 102
Escabana Co. v. Chicago, 107 U. S. 678 124
Essex Co. v. Commonwealth, 246 Mass. 242 180
Essex Pub. Rd. Bd. v. Skinkle, 140 U. S. 334 104
Estell v. State, 91 Tex. Cr. 481 120
Estep v. Hutchman, 14 Serg. & R. (Pa.) 435 100
Estes v. Belford, 22 Fed. 275 151
Eufaula v. McNab, 67 Ala. 588 195
Eureka Basin Warehouse &c. Co., In re, 96 N. Y. 42 174, 190
Eustace de Stuteville, In re, 3 Bracton, Notebook (1324) No. 1106 26
Evanhoff v. State Indus. Acc. Commn., 78 Ore. 503 96
Evansville &c. R. Co. v. State, 149 Ind. 276 149
Evel v. Utica, 103 Kans. 567 176
Everard's Breweries v. Day, 265 U. S. 545 229, 235
Evergreen Cemetery Assn. v. Beecher, 53 Conn. 551 194
Evison v. Chicago, St. P. &c. R. Co., 45 Minn. 370 129
Ewald v. Medical Soc., 144 App. Div. (N. Y.) 82 139, 141

[References are to Sections.]

Ewert v. Taylor, 38 S. Dak. 124 142
Ewing v. Filley, 43 Pa. 384 87
Excelsior Planting & Mfg. Co. v. Greene, 39 La. Ann. 455 165, 175
Extension v. Hancock Street, 6 Harris (Pa.) 26 169

F

Fairfield v. Gallatin County, 100 U. S. 47 185
Fair Haven &c. R. Co. v. New Haven, 203 U. S. 379 141, 149
Falender v. Atkins, 186 Ind. 455 88, 90
Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112 91, 112, 165, 167, 169, 176, 180, 225, 227, 231, 233
Fallon, Matter of, 28 Misc. (N. Y.) 748 199
Fall River Gas Wks. v. Board of Gas & L. Comrs., 214 Mass. 529 139
Fallsburg Power and Mfg. Co. v. Alexander, 101 Va. 98 192, 193
Fanning v. Guilland, 37 Ore. 369 171
Farb v. Theis (Tex. Civ. App.), 250 S. W. 290 115
Farley v. Liquors &c., 141 N. Y. S. 696 90
Farmer v. Lewis, 64 Ky. 66 128
Farmers &c. Co-op. Tel. Co. v. Boswell Tel. Co., 187 Ind. 371 122
Farmville v. Walker, 101 Va. 323 203
Farnsworth v. Hatch, 47 Utah 62 87
Farrell v. West Chicago Park Commrs., 181 U. S. 404 170
Farrelly v. Wells, 15 Misc. (N. Y.) 632 120
Farrow v. State, 91 Miss. 509 104
Farrows v. Farmer, 2 Roll. (1619) 246 20
Favorite Oil Co. v. Jef. Chaison Townsite Co. (Tex. Civ. App.), 162 S. W. 423 145
Fawcett v. Mt. Airy, 134 N. Car. 125 204, 205
Fawkeners v. Bellingham, 3 Croke (1628) 82 20
Fay v. Springfield, 94 Fed. 409 88
Fayerweather v. Ritch, 91 Fed. 721 91
Fayette County v. Wells, 195 Ky. 608 89
Fecheimer v. Louisville, 84 Ky. 306 107
Feibelman v. State, 130 Ala. 122 120
Feldman v. Charleston, 23 S. Car. 57 197
Fell v. State, 42 Md. 71 120
Fellows v. Charleston, 62 W. Va. 665 123
v. Walker, 39 Fed. 651 204, 205
Felton v. Wilt, 46 Pa. St. 457 87
Fenton, In re, 58 Misc. (N. Y.) 303 88
Fergus Falls v. Fergus Falls Hotel Co., 80 Minn. 165 190, 192, 194
Ferguson v. Ferguson (Tex. Civ. App.), 128 S. W. 632 87
v. Landram, 68 Ky. 230 200
v. Miners & Mfgrs. Bank, 35 Tenn. 609 147
Ferguson, In re, 80 Wash. 102 116
Ferrimer v. Commonwealth, 112 Va. 897 120
Ferris v. Bramble, 5 Ohio St. 109 171
Ferry v. Campbell, 110 Iowa 290 89
Fertilizing Co. v. Hyde Park, 97 U. S. 659 124
Fidelity & Deposit Co. v. Brown, 92 Vt. 390 142
Fidelity Tr. &c. Co. v. Mobile St. R. Co., 53 Fed. 687 157
Field v. Clark, 143 U. S. 649 165, 191
Fielden v. Illinois, 143 U. S. 452 96
Filbin Corp. v. United States, 265 Fed. 354 87
v. United States, 266 Fed. 911 87
Filer v. Steele, 228 Fed. 242 91
Filler v. Steele, 241 U. S. 648 98
Finch v. Zenith Furnace Co., 146 Ill. App. 257 151
Finley v Barker, 219 Mich. 442 90
v. California, 222 U. S. 28 229
Fire Department v. Helfenstein, 16 Wis. 136 142, 199
v. Noble, 3 E. D. Smith (N. Y.) 440 199
v. Wright, 3 E. D. Smith (N. Y.) 453 199
Firemen's Benev. Assn. v. Lounsberry, 21 Ill. 511 195, 199
First Municipality of N. O. v. McDonough, 2 Rob. (La.) 244 174, 203
First Nat. Bank v. Leeper, 121 Mo. App. 688 151
v. Moon, 102 Kans. 334 142
v. Multnomah State Bank, 87 Ore. 423 147
First State Bank v. Shallenberger, 172 Fed. 999 159
First Texas State Ins. Co. v. Smalley (Tex. Civ. App.), 233 S. W. 314 142
Fischer v. St. Louis, 194 U. S. 361 219
Fishback v. Fond Du Lac &c. R. Co., 158 Fed. 88 139
Fishblatt v. Atlantic City, 78 N. J. L. 134 202
Fisher v. Board of Regents, 108 Nebr. 666 208
v. McGirr, 1 Gray (Mass.) 1 88, 118
v. Wineman, 125 Mich. 642 110
Fisher Flouring M. Co. v. Brown, 109 Wash. 680 123, 228
Fisheries Commn. v. Hampton, Roads Oyster &c. Assn., 109 Va. 565 88

[*References are to Sections.*]

Fisher's Negroes v. Dabbs, 6 Yerg. (Tenn.) 119 102
Fish Seizure, In re, 5 Ohio Dec. 553 115
Fiske v. Framingham Mfg. Co., 12 Pick. (Mass.) 68 187
Fitch v. Livingston, 6 N. Y. Sup. Ct. 492 114
v. State, 102 Nebr. 361 123
Fitchburg R. Co. v. Grand Junction R. & D. Co., 4 Allen (Mass.) 198 149, 161
Flatbush Ave., In re, 1 Barb. (N. Y.) 286 157
Fletcher v. Peck, 6 Cranch (U. S.) 87 81, 135
Flexner v. Farson, 268 Ill. 435 151
v. Farson, 249 U. S. 289 151
Flint v. Stone Tracy Co., 220 U. S. 107 108
Flood v. Leahy, 183 Mass. 232 199
Flood Abatement Commn. v. Merritt, 94 Misc. (N. Y.) 388 112
Florida C. &c. R. Co. v. Reynolds, 183 U. S. 471 108
Florida East Coast R. Co. v. State, 79 Fla. 66 91, 110
Flowing Wells Co. v. Culin, 11 Ariz. 425 145
Floyd v. Perrin, 30 S. Car. 1 185
Flukes, In re, 157 Mo. 125 110
Follett Wool Co. v. Albany, T. W. Co., 61 App. Div. (N. Y.) 296 110
Folsom v. Township Ninety-six, 159 U. S. 611 185
Foltz v. State, 33 Ind. 215 116
Fong Yue Ting v. United States, 149 U. S. 698 91
Fontenot v. Accardo, 278 Fed. 871 89
Foote v. Greilick, 166 Mich. 636 139
Forbes Pioneer Boat Line v. Board of Commrs., 258 U. S. 338 110
Ft. Smith &c. R. Co. v. Mills, 253 U. S. 206 130, 133
Fort St. Union Depot Co. v. Morton, 83 Mich. 265 149
Fort Worth v. Capps Land Co. (Tex. Civ. App.), 205 S. W. 491 91
Foster v. Broas, 120 Mich. 1 151
v. County Comrs., 100 Wash. 502 175
v. Essex Bank, 16 Mass. 245 81, 82
v. Foster (Tex. Civ. App.) 230 S. W. 1064 87
v. Kansas, 112 U. S. 201 91, 120
v. Park Commrs., 133 Mass. 321 202
v. Rowe, 128 Wis. 326 89
v. Wood County, 9 Ohio St. 540 169
Fox v. Cincinnati, 104 U. S. 783 155
v. Mohawk &c. Humane Soc., 165 N. Y. 517 196
Fox v. Ohio, 5 How. (U. S.) 410 8, 84
Fox's Estate, In re, 166 App. Div. (N. Y.) 718 87
Francis, Ex parte, 76 Fla. 304 120
Frank v. Atlanta, 72 Ga. 428 128
v. Mangum, 237 U. S. 309 87, 96, 219, 231
v. State, 142 Ga. 741 97
Franke v. Murray, 248 Fed. 865 91
Franklin v. South Carolina, 218 U. S. 161 104
v. State Board of Examrs., 23 Cal. 173 200
Franklin County Ct. v. Deposit Bank, 87 Ky. 370 144
Franklin Grove v. Chicago &c. R. Co., 196 Ill. App. 167 149
Franklin Ins. Co. v. Louisville & A. Packet Co., 72 Ky. 590 151
Fraser v. Lee, 8 Ohio App. 235 115
Freeborn v. Smith, 2 Wall. (U. S.) 160 104
Freeland v. Hastings, 10 Allen (Mass.) 570 200
v. Williams, 131 U. S. 405 91, 104
Freeman's Estate, In re, 181 Pa. St. 405 90
French v. Barber Asphalt Pav. Co., 181 U. S. 324 2, 87, 170, 231
v. Birmingham, 165 Ala. 669 120
v. Quincy, 3 Allen (Mass.) 9 195
Friend v. Gilbert, 108 Mass. 408 199
Frink v. National Mut. Fire Ins. Co., 90 S. Car. 544 142
Frisbie v. United States, 157 U. S. 166 200
Frohwerk v. United States, 249 U. S. 204 128
Frorer v. People, 141 Ill. 171 114
v. People, 142 Ill. 387 127
Frost v. Los Angeles, 181 Cal. 22 114
Frowert v. Blank, 205 Pa. 299 151
Fruin-Colnon Contracting Co. v. Chatterson, 146 Ky. 504 151
Fryeburg Water Co., In re, 79 N. H. 123 139
Fuchs v. Common Council, 166 Mich. 569 120
Fuller v. Groton, 11 Gray (Mass.) 340 198
v. Morrison, 36 Minn. 309 198, 199
v. Sylvia, 240 Mass. 49 87
Fulton v. M'Afee, 16 Pet. (U. S.) 149 232
v. State, 171 Ala. 572 90, 120
Fulton, Ex parte, 86 Tex. Cr. 149 120
F. W. Cook Brew. Co. v. Garber, 168 Fed. 942 120

G

Gaar, Scott & Co. v. Shannon, 223 U. S. 468 142
Gabel v. Housten, 29 Tex. 335 120

[*References are to Sections.*]

Gage v. Chicago, 225 Ill. 218 89
Gaines v. Buford, 1 Dana (Ky.) 481, 88, 102
v. Gaines, 9 B. Mon. (Ky.) 295 104
Gallovich v. People, 68 Colo. 299 120
Galloway v. Memphis, 116 Tenn. 736 144
Gallup v. Schmidt, 183 U. S. 300 89
Galveston, H. &c. R. Co. v. Texas, 210 U. S. 217 108
Gamble v. McCrady, 75 N. Car. 509 88
Gamer Co. v. Gamage (Tex. Civ. App.), 241 S. W. 736 145
Ganebin v. Phelan, 5 Colo. 83 151
Garbutt Lumber Co. v. Georgia &c. R., 111 Ga. 714 180
Gardner v. Georgia R. & Banking Co., 117 Ga. 522 180
v. Hope Ins. Co., 9 R. I. 194 151
v. Newburgh, 2 Johns. (N. Y. Ch.) 162 81, 88
Garey v. St. Joe Min. Co., 32 Utah 497 140, 151, 154, 158
Garfield v. United States, 32 App. D. C. 109 90
v. United States, 211 U. S. 249 88
Garland v. Washington, 232 U. S. 642 96
Garland, Ex parte, 4 Wall. (U. S.) 333 116
Garland Novelty Co. v. State, 71 Ark. 138 90
Garnett v. Jennings, 19 Ky. L. 1712 89
Garrett v. St. Louis, 25 Mo. 505 169
Garrison v. New York City, 21 Wall. (U. S.) 196 104
Gast Realty & Inv. Co. v. Schneider Granite Co., 240 U. S. 55 170
Gathright v. Byllesby, 154 Ky. 106 122
Gatlin v. Walton, 60 N. Car. 325 128
Gaulden v. Wright, 140 Ga. 800 90
Gauley, & S. R. Co. v. Vencill, 73 W. Va. 650 180
Gaylord v. Sanitary Dist., 204 Ill. 576 187
Gaynor v. Port Chester, 174 App. Div. (N. Y.) 122 198
Geiger-Jones Co. v. Turner, 230 Fed. 233 107, 151
Gelpcke v. Dubuque, 1 Wall. (U. S.) 175 184
Gemert v. Pooler, 171 Wis. 271 90
General Const. Co. v. Connally, 3 Fed. (2d) 666 132
George Sweet Mfg. Co. v. Van Der Hoof, 137 App. Div. (N. Y.) 492 180
Georgia R. & Banking Co. v. Bennefield, 138 Ga. 670 151
v. Smith, 128 U. S. 174 90, 179
Georgia R. & Power Co. v. Railroad Commn., 262 U. S. 625 229
Georgia R. Co. v. Ivey, 73 Ga. 499 96
Gerke v. Purcell, 25 Ohio St. 229 195, 196
German Alliance Ins. Co. v. Lewis, 233 U. S. 389 90, 91, 142, 235
German-American Bank v. Smith, 202 Mo. App. 133 151
German American Coffee Co. v. Diehl, 216 N. Y. 57 142
German Evangelical Cong. v. Schreiber, 277 Mo. 113 115
Germania Sav. Bank v. Suspension Bridge, 159 N. Y. 362 104
German Ins. Co. v. Commonwealth, 141 Ky. 606 145
Germantown Trust Co. v. Powell, 265 Pa. 71 91
Getzen v. Sumter Co. (Fla.), 103 So. 104 171
Gherna v. State, 16 Ariz. 344 120
Gibbons v. Mobile &c. R. Co., 36 Ala. 410 185
v. Ogden, 9 Wheat. (U. S.) 1 113
Gibbs v. Consolidated Gas Co., 130 U. S. 396 153
Giddings v. Brown, 2 Prince Soc. Pub. (1657) 1 43
Gifford v. New Jersey R. & Transp. Co., 10 N. J. Eq. 171 139
Gilbert v. Ackerman, 159 N. Y. 118 110
v. Minnesota, 254 U. S. 325 128
Gilchrist v. Schmidling, 12 Kans. 263 11, 88, 96, 110
Gill v. Parker, 31 Vt. 610 88
Gillan v. Gillan, 55 Pa. St. 430 198
Gillespie v. People, 188 Ill. 176 127
Gillett v. Romig, 17 Okla. 324 110
Gillette v. Aurora R. Co., 228 Ill. 261 180
Gillmore v. Shooter's Exrs., 2 Mod. (K. B., 1691) 310 25
Gilman v. Sheboygan, 2 Black (U. S.) 510 185
v. Tucker, 128 N. Y. 190 88, 110
Gilmer v. Hunnicutt, 57 S. Car. 166 112
v. Lime Point, 18 Cal. 229 89
Gilmore v. Henting, 33 Kans. 156 88
v. Shuter, 2 Levinz (K. B., 1690) 227 25
Gilson v. Munson, 114 Mich. 671 178
Giozza v. Tiernan, 148 U. S. 657 90, 108, 123
Given v. State, 160 Ind. 552 90
Gladson v. Minnesota, 166 U. S. 427 127
Gleason v. Waukesha Co., 103 Wis. 225 172
v. Wood, 224 U. S. 679 144
Glendenning v. Stahley, 173 Ind. 674 171
Glenn v. Dallas County Levee Dist. (Tex. Civ. App.), 275 S. W. 137 89
v. Southern Exp. Co., 170 N. Car. 286 120

[*References are to Sections.*]

Glidden v. Harrington, 189 U. S. 255 89
Globe & Rutgers Fire Ins. Co. v. Walker, 150 Ga. 163 142
Glouchester Tpk. Co. v. American Pipe Co., 77 N. J. Eq. 471 139
Glucose Refin. Co. v. Chicago, 138 Fed. 209 123
Goddard v. Chicago &c. R. Co., 104 Ill. App. 526 192
v. Jacksonville, 15 Ill. 588 118
v. State, 10 Tenn. 96 87
Goddin v. Crump, 8 Leigh (Va.) 120 181
Godfrey v. Bennington Water Co., 75 Vt. 350 88, 89
Goldfield Consol. Mill &c. Co. v. Old Sandstorm &c. Min. Co., 38 Nev. 426 190
Gold Issue Min. &c. Co. v. Pennsylvania Fire Ins. Co., 267 Mo. 524 151
Goldman v. Crowther (Md.), 128 Atl. 50 114
Goldstein v. Chicago, 172 Ill. App. 415 128
Gonzales v. Sullivan, 16 Fla. 791 144
Goodman v. New York R. Co., 88 Misc. (N. Y.) 95 160
Goodspeed v. Wayne Circ. Judge, 199 Mich. 273 90
Gordon v. Calcleugh, 3 Cranch (U. S.) 268 232
v. Cornes, 47 N. Y. 608 171
v. Corning, 174 Ind. 337 120
Gorman v. Pacific R. Co., 26 Mo. 441 159
Goshen v. Stonington, 4 Conn. 209 82, 100
Gottlieb v. Matckins, 117 Misc. (N. Y.) 128 130
Gottstein v. Lister, 88 Wash. 462 120
Gould v. Gould, 78 Conn. 242 226
v. Sterling, 23 N. Y. 439 185
Gould & Co. v. Atlanta, 55 Ga. 678 107
Governor & Council v. Morey, 78 N. H. 125 89
Goytino v. McAleer, 4 Cal. App. 655 118
Grace v. Gulf &c. Co., 25 So. (Miss.) 875 159
Grace, Ex parte, 12 Idaho 208 88
Grade Crossing Commrs., In re, 207 N. Y. 52 180
Graded School Trustees v. Hinton, 165 N. Car. 12 195
Graffty v. Rushville, 107 Ind. 502 107
Gragg v. State, 73 Okla. 132 120
Graham v. West Virginia, 224 U. S. 616 96
Grande Ronde Elec. Co. v. Drake, 46 Ore. 243 192
Grand Lodge v. New Orleans, 44 La. Ann. 659 144
Grand Rapids v. DeVries, 123 Mich. 570 122
Grand St. Realty Co. v. Universal Textile Co., 191 N. Y. S. 655 145
Grand Trunk W. R. Co. v. Industrial Commn., 291 Ill. 167 114
v. South Bend, 174 Ind. 203 145
v. South Bend, 227 U. S. 544 160
Grandville v. Grand Rapids, H. & C. R., 225 Mich. 587 149
Granite State Land Co. v. Hampton, 77 N. H. 179 172
Grant v. Cananea Consol. Copper Co., 189 N. Y. 241 151
v. Courter, 24 Barb. (N. Y.) 232 185
v. Davenport, 36 Iowa 396 122
Grant Timber & Mfg. Co. v. Gray, 236 U. S. 133 94
Gravelly Ford Canal Co. v. Pope & T. L. Co. (Cal. App.), 178 Pac. 150 177
Graves, Case of, 236 Mass. 493 87
Gray v. Commonwealth, 171 Ky. 69 116
v. McLendon, 134 Ga. 224 88, 91
v. Mossman, 91 Conn. 430 89
Greasy Creek Min. Co. v. Ely Jellico Coal Co., 132 Ky. 692 180
Great Eastern Cas. Co. v. Haynie, 147 Ga. 119 151
Great Falls Power Co. v. Webb, 123 Tenn. 584 193
Great Northern R. Co. v. Cahill, 253 U. S. 71 90, 160, 220
v. Minneapolis, 136 Minn. 1 89
v. Minnesota, 246 U. S. 434 149
Green v. Eastern R. Co. &c., 52 Minn. 79 149
v. Frazier, 44 N. Dak. 395 209, 228
v. Frazier, 253 U. S. 233 209, 228, 234
v. Jones, 164 Ark. 118 195
v. Kelley, 228 Mass. 602 102
v. Port Jervis, 31 Misc. (N. Y.) 59 110
v. Red Cross Med. &c. Co., 232 Ill. 616 91
v. Shumway, 39 N. Y. 418 116
v. State, 73 Ala. 26 104
v. Steamer Helen, 1 Fed. 916 114
Green, Matter of, 166 N. Y. 485 199
Greene v. Briggs, Fed. Cas. No. 5,764 2, 81, 87, 93, 118
v. James, Fed. Cas. No. 5766 88, 118
v. San Antonio (Tex. Civ. App.), 178 S. W. 6 91
Greene, Matter of, 55 App. Div. (N. Y.) 475 198
Greene, Matter of, 166 N. Y. 485 199
Greenfield v. Central Labor Council, 104 Ore. 236 110
Greenough v. Greenough, 11 Pa. 489 80
Greenwood v. Freight Co., 105 U. S. 13 146, 156
Gregg v. Granby Min. & S. Co., 164 Mo. 616 140

[*References are to Sections.*]

Gregory v. Bridgeport, 41 Conn. 76 199
v. Hecke (Cal. App.), 238 Pac. 787 87
Gridley v. Bloomington, 88 Ill. 554 124
Grieg v. Ware, 25 Colo. 184 88
Grier v. Kansas City &c. R. Co. (Mo.), 254 S. W. 359 91
Griesedieck Bros. Brew. Co. v. Moore, 262 Fed. 582 120
Griffin v. Commonwealth, 7 Ky. 300 120
v. Gloversville, 67 App. Div. (N. Y.) 403 128
v. Kentucky Ins. Co., 66 Ky. 592 156
v. Mixon, 38 Miss. 424 88, 94
v. Southern R. Co., 150 N. Car. 312 149
Griffith, In re, 103 Misc. (N. Y.) 562 87
Griggsry Constr. Co. v. Freeman, 108 La. 435 89
Grim v. Weissenberg School Dist., 57 Pa. St. 433 200
Grimm v. Elkhorn Valley Drainage Dist., 98 Nebr. 260 173
Grisim v. South St. Paul Live Stock Exch., 152 Minn. 271 145
Grobe v. Erie County Mut. Ins. Co., 39 App. Div. (N. Y.) 183 139
Groce v. Territory, 12 Ariz. 1 104
Groel v. United Elec. Co., 69 N. J. Eq. 397 151
Groesbeck v. Duluth S. S. &c. R. Co., 250 U. S. 607 90
v. Seeley, 13 Mich. 329 88
Groot v. Reilly, 266 Fed. 1008 107, 132
v. Reilly, 254 U. S. 661 107, 132
Gross v. United States Mtg. Co., 108 U. S. 477 86
Grossman v. Consolidated Gas Co., 186 N. Y. 541 90
Gross Production &c. Oil Co., In re, 53 Okla. 24 108
Groves v. Ware, 182 N. Car. 553 87, 89
Grumbach v. Lelande, 154 Cal. 679 120
Guernsey v. Burlington, 4 Dill. (U. S.) 372 192
Guerra, In re, 94 Vt. 1 114
Guilford v. Chenango County, 13 N. Y. 143 198
Guillotte v. New Orleans, 12 La. Ann. 432 115
Guimarin v. Southern Life & T. Co., 100 S. Car. 12 151
Gulf &c. R. Co. v. Adams, 90 Miss. 559 142, 148
v. Hewes, 183 U. S. 66 144
Gulf C. &c. R. Co. v. Ellis, 165 U. S. 150 103, 126
v. Louisiana Pub. Serv. Commn., 151 La. 635 149
v. State (Tex. Civ. App.), 167 S. W. 192 149
v. State (Tex. Civ. App.), 212 S. W. 845 120
Gulf C. &c. R. Co. v. Texas, 246 U. S. 58 90
Gulf Coast Ice & Mfg. Co. v. Bowers, 80 Miss. 570 204, 205
Gundling v. Chicago, 177 U. S. 183 123
Gunn v. State, 89 Ga. 341 116
v. Union R. Co., 23 R. I. 289 91
v. Union R. Co., 27 R. I. 320 89
Gunter v. Sanford, 186 N. Car. 452 88, 89
Gustafson v. Rhinow, 144 Minn. 415 201
Guthrie Nat. Bank v. Guthrie, 173 U. S. 528 198
v. McElhinney, 5 Okla. 107 89, 91
Guttag v. Shatzkin, 194 App. Div. (N. Y.) 509 131
v. Shatzkin, 113 Misc. (N. Y.) 362 132
v. Shatzkin, 230 N. Y. 647 131, 132
Guzzi v. McAlister, 21 Cal. App. 276 120

H

Hackett v. Ottawa, 99 U. S. 86 190
Hackney v. Elliott, 23 N. Dak. 373 174
Hadsell v. Hancock, 3 Gray (Mass.) 526 198
Haeussler Inv. Co. v. Bates, 306 Mo. 392 89
Hagar v. Childrens' Home Soc., 119 Ky. 235 195, 196
v. Reclamation Dist. No. 108, 111 U. S. 701 86, 89, 91, 124, 169, 174
v. Yolo County, 47 Cal. 222 173, 174
Haggard v. Mason, 153 Ky. 113 102
Hagler v. Larner, 284 Ill. 547 128
v. Small, 307 Ill. 460 201
Hagmayer v. Farley, 23 App. Div. (N. Y.) 426 151
Hairston v. Danville &c. R. Co., 208 U. S. 598 112, 180, 231
Halbruegger v. St. Louis, 302 Mo. 573 195
Hale v. Lawrence, 21 N. J. L. 714 90, 128
Hall v. Geiger-Jones Co., 242 U. S. 539 107, 151
v. Houston &c. R. Co., 52 Tex. Civ. App. 90 149
v. Judge of Super. Ct., 88 Mich. 438 104
v. Moran, 81 Fla. 706 120
v. State, 124 Tenn. 235 106
v. West & Slade Mill Co., 39 Wash. 447 96
Hall, In re, 50 Cal. App. 786 235
Hallett v. Denver, 4 Colo. L. R. 565 124
Hallinger v. Davis, 146 U. S. 314 87, 96
Halloway v. Police Jury, 16 La. Ann. 203 103
Halsey v. Merrick, 228 Fed. 805 151

[*References are to Sections.*]

Halstead v. Mayor of New York, 3 Comst. (N. Y.) 430 199
Ham v. McClaws, 1 Bay (S. Car.) 93 81
Hamaguchi, Ex parte, 161 Fed. 185 91
Hamann v. Heekin, 88 Ohio St. 207 104
Hamblin v. Marchant, 103 Kans. 508 91
Hamden v. New Haven, 91 Conn. 589 195, 197, 207
Hamilton v. Adams, 2 Murphy (N. Car.) 161 79, 80, 88
v. Kentucky Distilleries &c. Co., 251 U. S. 146 120, 130, 131
Hamilton Gas &c. Co. v. Hamilton, 37 Fed. 832 204
v. Hamilton, 146 U. S. 258 146
Hammersmith Rent-Charge, In re, 4 Exch. (1849) 87 21
Hammerstein, Matter of, 57 Misc. (N. Y.) 52 116
Hammett v. Philadelphia, 65 Pa. St. 146 166, 169
Hammon v. Hyde Park, 195 Mass. 29 128
Hammond v. Winder, 100 Ohio 433 89
Hammond Packing Co. v. Arkansas, 212 U. S. 322 91, 153, 231
Hamor v. Bar Harbor Water Co., 78 Maine 127 192
Hampden's Case, 3 Howell St. Tr. (1637) 825, 2 Rushworth Hist. Coll. appen. 162 28, 29
Hancock v. Muskogee, 66 Okla. 195 89
v. Muskogee, 250 U. S. 454 89, 170
v. Yaden, 121 Ind. 366 152
Handley v. Graham, 187 Ky. 316 89
Hankins v. Lawrence, 8 Blackf. (Ind.) 266 187
Hannah v. Clyne, 263 Fed. 599 120
Hanna's Will, In re, 121 Misc. (N. Y.) 754 87
Hanover Fire Ins. Co. v. Carr, 317 Ill. 366 142
Hanover Township v. Camp Meeting Assn., 76 N. J. L. 827 111
Hansen v. Hammer, 15 Wash. 315 89, 175
Hanson v. Krehbiel, 68 Kans. 670 110
v. Vernon, 27 Iowa 28 165, 166, 179, 182, 183
Hanzal v. San Antonio (Tex. Civ. App.), 221 S. W. 237 114
Happy v. Mosher, 48 N. Y. 313 110
Harbison v. Knoxville Iron Co., 103 Tenn. 421 88
Hardcastle, Ex parte, 84 Tex. Cr. 463 90
Harding v. Funk, 8 Kans. 315 192
v. Goodlett, 3 Yerg. (Tenn.) 41 87
Hardison v. Plummer, 152 Ala. 619 151
Hardy v. Waltham, 24 Mass. 108 144
Harlem River &c. R. Co. v. Arnow, 21 App. Div. (N. Y.) 636 180
Harmon v. Bolley, 187 Ind. 511 89
v. Chicago, 110 Ill. 400 114
Harp v. Choctaw, O. &c. R. Co., 118 Fed. 169 160
Harper v. Galloway, 58 Fla. 255 107
Harriman v. Southern R. Co., 111 Tenn. 538 149
Harrington v. Berkshire County, 22 Pick. (Mass.) 263 82
Harris v. Chickasaw County, 77 Iowa 345 198
v. Saratoga Springs, 152 N. Y. S. 73 172
v. Wood, 6 T. B. Mon. (Ky.) 641 89
Harrison v. Chiles, 13 Ky. 194 89
v. Philadelphia, 217 Fed. 107 112
v. St. Louis &c. R. Co., 232 U. S. 318 145, 146
v. Wallis, 44 Misc. (N. Y.) 492 116
Harris-Woodbury Lumber Co. v. Coffin, 179 Fed. 257 145
Harrold Bros. v. Americus, 142 Ga. 686 180
Hart v. Cornwall, 14 Conn. 228 111
v. Holden, 55 Maine 572 200
Hart, In re, 36 Cal. App. 627 107
Harter v. Kernochan, 103 U. S. 562 185
Hartford v. Champion, 58 Conn. 268 89
Hartford Fire Ins. Co. v. Raymond, 70 Mich. 485 142
Hartford Life Ins. Co. v. Blincoe, 255 U. S. 129 91
Hartwell v. Armstrong, 19 Barb. (N. Y.) 166 173
Hartzell v. Alton &c. Trac. Co., 263 Ill. 305 159
Harvey v. Thomas, 10 Watts. (Pa.) 63 180
v. Warren, 212 Ala. 415 171
Hasbrouck v. Milwaukee, 13 Wis. 37 203
v. Shipman, 16 Wis. 296 128
Hastings Industrial Co. v. Moran, 143 Mich. 679 151
Hatcher v. State, 80 Tenn. 368 106, 120
Havens v. Colonial Apt. House Co., 97 Nebr. 639 145
Haverford Elec. L. Co. v. Hart, 13 Pa. Co. Ct. 369 192
Hawes v. Georgia, 258 U. S. 1 120
Hawkins v. Bleakly, 243 U. S. 210 96, 199
v. Langum, 115 Minn. 100 91
v. Smith, 242 Mo. 688 96
Hawley v. Bonanza Queen Min. Co., 61 Wash. 90 145
v. Walker, 232 U. S. 718 226
Haw Moy v. North, 223 U. S. 717 91
Hay v. St. Louis &c. R. Co., 161 Mo. App. 1 159

[*References are to Sections.*]

Hay v. Superior Court, 61 Cal. App. 667 104
Hayden v. Noyes, 5 Conn. 391 103
Hayes v. Douglas County, 92 Wis. 429 88, 195
Hayes, Ex parte, 98 Cal. 555 120
Hayhurst's Estate, In re, 215 Ill. App. 315 87
Hayne v. State, 71 Fla. 585 104
Hays v. Commonwealth, 82 Pa. 518 140
v. Port of Seattle, 251 U. S. 233 112
Hayward v. Red Cliff, 20 Colo. 33 203
Haywood v. United States, 268 Fed. 795 91
Hazard v. Park, 294 Fed. 40 145
Hazen v. Essex Co., 12 Cush. (Mass.) 475 187
v. Union Bank, 33 Tenn. 115 104
Head v. Amoskeag Mfg. Co., 113 U. S. 9 86, 112, 173, 174, 187
Health Dept. v. Rector of Trinity Church, 145 N. Y. 32 90
v. Rector of Trinity Church, 17 N. Y. S. 510 114
Healy v. Backus, 221 Fed. 358 91
Healy Lumber Co. v. Morris, 33 Wash. 490 171
Hearfield v. Bridges, 75 Fed. 47 88
Heath &c. Mfg. Co. v. Worst, 207 U. S. 338 217
Hebe Co. v. Shaw, 248 U. S. 297 217, 224, 228
Heck v. State, 44 Ohio St. 536 120
Hedden v. Verona, 82 N. J. L. 736 172
Helena Light & R. Co. v. Helena, 47 Mont. 18 160
Helena Power T. Co. v. Spratt, 35 Mont. 108 177
Helena Waterworks Co. v. Helena, 195 U. S. 383 204
Hench v. Pritt, 62 W. Va. 270 180
Henderson v. Henderson Trac. Co., 200 Ky. 183 149
v. London Ins. Co., 135 Ind. 23 195, 199
v. McMaster, 104 S. Car. 268 142
v. Sibley, 28 Minn. 515 171
Henderson Bridge Co. v. Henderson, 173 U. S. 592 144, 192
Henderson Trac. Co. v. Henderson, 178 Ky. 124 149
Hendersonville Light &c. P. Co. v. Blue Ridge I. R. Co., 243 U. S. 563 193
Hendrick v. Maryland, 235 U. S. 610 142
Henley v. Myers, 215 U. S. 373 147
Hennepin County v. Brotherhood, 27 Minn. 460 195, 196
Hennessy v. Douglas County, 99 Wis. 129 88
Hennington v. Georgia, 163 U. S. 299 116, 127, 214
Henry v. Cohen, 66 Ala. 382 195
Hensberg v. United States, 288 Fed. 370 120
Hepburn v. Griswold, 8 Wall. (U. S.) 603 122
Herlihy v. Donohue, 52 Mont. 601 90, 130, 132
Herman Bros. Co. v. Nasiacos, 46 Colo. 208 142
Hernandez v. State (Tex. Civ. App.), 135 S. W. 170 114, 120
Herndon v. Chicago, R. I. &c. R. Co., 218 U. S. 135 146, 157
Herreid v. Ettrick & N. R. Co., 179 Wis. 516 185, 186
Herrin v. Fatima, 230 Ill. App. 221 120
Hersee v. Porter, 100 N. Y. 403 89
Hewitt v. New York &c. R. Co., Fed. Cas. No. 6,443 144
v. State, 25 Tex. 722 88
Hey Sing Ieck v. Anderson, 57 Cal. 251 124
Hibbard v. People, 4 Mich. 125 88
v. State, 65 Ohio St. 574 199
Hibben v. Smith, 191 U. S. 310 89
Hidekuni Iwata, Ex parte, 219 Fed. 610 91
Higbee, Estate of, 5 West Coast Rep. 505 104
Higginson v. Treasurer, 212 Mass. 583 202
Highbaugh v. Huff, 205 Ky. 353 145
High Bridge Lumber Co. v. United States, 69 Fed. 320 87
Highland Boy Gold Min. Co. v. Strickley, 200 U. S. 527 180
Highland Park School Dist. v. McMurtry, 169 Ky. 457 128
Highway Commrs., In re, 74 Hun (N. Y.) 44 149
Hilbish v. Catherman, 64 Pa. St. 154 200
Hildebrand v. Kinney, 172 Ind. 447 87
Hill v. Bickers, 171 Ky. 703 128
v. Commrs., 67 N. Car. 367 185
v. Davis (Tex. Civ. App.), 257 S. W. 340 88
v. East Hampton, 140 Mass. 381 195
v. Higdon, 5 Ohio St. 243 169
v. Rae, 52 Mont. 378 203
v. Sunderland, 3 Vt. 507 104
v. Tohill, 225 Ill. 384 178
Hiller v. State, 124 Md. 385 116
Hilton v. Merritt, 110 U. S. 97 89, 91, 94
Hinckley v. Schwarzschild & S. Co., 107 App. Div. (N. Y.) 470 139, 145, 154
Hindman v. Oregon Short Line R. Co., 32 Idaho 133 159
Hines, Ex parte, 205 Ala. 17 159
Hines, In re, 33 Cal. App. 45 107
Hirschfeld v. McCullagh, 64 Ore. 502 142, 151
Hirsh v. Block, 267 Fed. 614 132
Hirshfeld v. Fitzgerald, 157 N. Y. 166 151
Hitchcock v. Litchfield, 1 Root (Conn.) 206 200
v. St. Louis, 49 Mo. 484 195
Hixon v. Sharon, 190 Mass. 347 198

[*References are to Sections.*]

Hixon, In re, 61 Cal. App. 200 120
H. K. Mulford Co. v. Curry, 163 Cal. 276 142, 143
Hoblitzel v. Jenkins, 204 Ky. 122 114
Hochfeld v. Portland, 72 Ore. 190 144
Hockett v. State, 105 Ind. 250 90
Hocking Valley R. Co. v. Public Util. Commn., 92 Ohio St. 9 149
v. Public Util. Commn., 100 Ohio St. 321 90
Hodge v. Muscatine County, 196 U. S. 276 93, 94
Hodgson v. Vermont, 168 U. S. 262 96, 120
Hoertz v. Jefferson &c. Drainage Co., 119 Ky. 824 174
Hoffman v. Charlestown Five Cents Sav. Bank, 231 Mass. 324 128
v. Milwaukee Elec. R. &c. L. Co., 127 Wis. 76 110
Hoffman Brew. Co. v. McElligott, 259 Fed. 321 120
Hoge v. Railroad Co., 99 U. S. 348 144
Hohorst, In re, 150 U. S. 653 151
Hoke v. Henderson, 15 N. Car. 1 88, 101
Holcombe v. Creamer, 231 Mass. 99 131
Holden v. Hardy, 169 U. S. 366 88, 96, 97, 105, 108, 127, 226
v. James, 11 Mass. 396 80, 99, 101, 104
Hollender v. Rochester Food Products Corp., 124 Misc. (N. Y.) 130 139, 149
Hollett v. Denver, 4 Colo. L. R. 565 88
Hollister v. State, 9 Idaho 8 102
Holly v. Holly, 157 Iowa 584 87
Holmes v. Holmes, 4 Barb. (N. Y.) 295 82, 102
Holst v. Roe, 39 Ohio St. 340 159
Holt v. Somerville, 127 Mass. 408 202
Holton v. Camilla, 134 Ga. 560 207
Holyoke Co. v. Lyman, 15 Wall. (U. S.) 500 150, 160
Home Ins. Co. v. Morse, 20 Wall. (U. S.) 445 142, 145
v. Swigert, 104 Ill. 653 112
Home of the Friendless v. Rouse, 8 Wall. (U. S.) 430 144
Homes Elec. Protective Co. v. Williams, 228 N. Y. 407 180
Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. 265 90, 148
v. Los Angeles, 227 U. S. 278 88
Hood v. Lynn, 1 Allen (Mass.) 103 195
v. Tharp, 228 Ill. 244 89
v. Von Glahn, 88 Ga. 405 120
Hooker v. Knapp, 225 U. S. 302 90
Hooper v. California, 155 U. S. 648 142, 151
v. People, 155 U. S. 648 147
Hope v. Johnson, 2 Yerg (Tenn.) 123 100, 102
Hopkins v. Fachant, 130 Fed. 839 88
Hoquiam v. Lenhart, 86 Wash. 625 204
Horace Keane Aeroplanes, 194 App. Div. (N. Y.) 873 140
Horn Silver Min. Co. v. New York, 143 U. S. 305 142
Horton v. Southern R. Co., 173 Ala. 231 149
Hostetler v. Harris, 45 Nev. 43 107
Hostetter v. State, 26 Ohio Cir. Ct. 702 89
Houck v. Little River Drainage Dist., 239 U. S. 254 170, 174
Houghton v. Dickinson, 196 Mass. 389 102
House v. Mayes, 219 U. S. 270 123
v. Road Impr. Dist. No. 2, 158 Ark. 330 89
House, Ex parte, 36 Tex. 83 104
House, In re, 23 Colo. 87 195
House Bill No. 147, In re, 23 Colo. 504 152
House Bill No. 203, In re, 21 Colo. 27 127
Houseman v. Kent. Circ. Judge, 58 Mich. 364 124
House of Reform v. Lexington, 112 Ky. 171 195
Houston v. Bogle, 32 N. Car. 496 82
v. Jefferson College, 63 Pa. 428 137, 139
v. West Greenville, 126 S. Car. 484 112
Houston &c. R. Co. v. Dallas, 98 Tex. 396 149
Hovermale v. United States, 5 Fed. (2d) 586 120
Hovis v. Cudahy Refin. Co., 95 Kans. 505 96
Howard v. County Supervisors, 54 Nebr. 443 89
v. Kentucky, 200 U. S. 164 8, 91
Howard Mills Co. v. Schwartz Lumber &c. Co., 77 Kans. 599 190
Howard Realty Co. v. Paducah, &c. R. Co., 182 Ky. 494 180
Howell v. Edwards, 89 N. J. L. 713 108
v. State, 71 Ga. 224 120
Hoxie v. Gibson, 155 Ark. 338 89
v. New York, N. H. &c. R. Co., 82 Conn. 352 96
Hubbard v. Taunton, 140 Mass. 467 195
Hubbert v. Campbellsville Lumber Co., 191 U. S. 70 88
Huber v. Reily, 53 Pa. 112 88
Hubert de Burgh and Gilbert Basset, In re, 2 Bracton, Notebook (1324) No. 857 16, 26
Hudgins, Ex parte, 86 W. Va. 526 114
Huffman v. Oregon R. & Nav. Co., 57 Wash. 494 159
v. Western Mtg. & Inv. Co., 13 Tex. Civ. App. 169 142

[*References are to Sections.*]

Hughes v. Arkansas &c. R. Co., 74 Ark. 194 149
v. Cairo, 92 Ill. 339 142
v. Pine Lawn Cemetery, 177 N. Y. S. 175 157
Huling v. Ehrick, 183 Ill. 315 89
Humason, In re, 46 Fed. 388 96
Humboldt Land &c. Co. v. Dist. Ct., 224 Pac. 612 88
Hume v. Rogue River Pack. Co., 51 Ore. 237 106
Humes v. Ft. Smith, 93 Fed. 857 217
Humphrey v. Board of Trustees, 109 N. Car. 132 115
v. Pegues, 16 Wall. (U. S.) 244 144
Humphries v. Little Sisters of the Poor, 29 Ohio St. 201 195, 196
Hunt Drainage Dist. v. Harness, 317 Ill. 292 173
Hunter v. Colfax Consol. Coal Co., 175 Iowa 245 96
v. Owens, 80 Fla. 812 165, 174
v. Pittsburgh, 207 U. S. 161 8
v. Wells Fargo Exp. Co., 134 La. 358 142
Hunter, Ex parte, 2 W. Va. 122 116
Huntley Dairy Co. v. Short, 178 Ill. App. 372 89
Huron Waterworks Co. v. Huron, 7 S. Dak. 9 204
Hurt v. Yazoo &c. R. Co., 140 Tenn. 623 149
Hurtado v. California, 110 U. S. 516 29, 71, 86, 96, 97, 108, 110, 233
Hutchins v. Durham, 137 N. Car. 68 128
v. Edson, 1 N. H. 139 93
Hutchinson v. Valdosta, 227 U. S. 303 123
Hutchinson Ice Cream Co. v. Iowa, 242 U. S. 153 228
Huth v. Huth (Tex.), 187 S. W. 523 90
Hutson v. Woodbridge Protec. Dist., 79 Cal. 90 88
Hutton v. Camden, 39 N. J. L. 122 90
Hyatt v. Esmond, 37 Barb. (N. Y.) 601 139
v. McMahon, 25 Barb. (N. Y.) 457 140, 147
v. Whipple, 37 Barb. (N. Y.) 595 141
Hyattsville v. Smith, 105 Md. 318 172
v. Washington, W. &c. R. Co., 122 Md. 660 87
Hygrade Provision Co. v. Sherman, 266 U. S. 497 132
Hyland v. Sharp, 88 Miss. 567 106

I

Idaho-Iowa Lateral & R. Co. v. Fisher, 27 Idaho 695 177
Ideal Tea Co. v. Salem, 77 Ore. 182 107
Iler v. Ross, 64 Nebr. 710 122
Illinois & Mich. Canal v. Chicago, 12 Ill. 403 168
Illinois Cent. R. Co. v. Commonwealth, 33 Ky. L. 326 142
v. Commonwealth, 138 Ky. 742 149
v. Copiah County, 81 Miss. 685 149
v. Davidson, 225 Ill. 618 159
v. Decatur, 147 U. S. 190 170, 191
v. East Sioux Falls, 33 S. Dak. 63 180
v. Emmerson, 299 Ill. 328 114
v. Illinois, 146 U. S. 387 185
v. Paducah Brew. Co., 157 Ky. 357 90, 120
v. Swalm, 83 Miss. 631 149
v. Willenborg, 117 Ill. 203 159
Illinois State Board v. People, 123 Ill. 227 230
Illinois Tr. & Sav. Bank v. Arkansas City W. Co., 67 Fed. 196 122
Independence v. Missouri Pac. R. Co., 86 Mo. App. 585 149
Independent School Dist. v. Hewitt, 105 Iowa 663 195
Independent Tug Line v. Lake Superior Lumber &c. Co., 146 Wis. 121 142
Indianapolis v. Bieler, 138 Ind. 30 107
v. Navin, 151 Ind. 139 148
Indianapolis &c. R. Co. v. Kercheval, 16 Ind. 84 113
v. New Castle, 43 Ind. App. 467 149
Indian Harbor Belt R. Co. v. Green, 289 Ill. 81 142
Indian Refining Co. v. Taylor, 195 Ind. 223 88
Ingleside Mfg. Co. v. Charleston Light & W. Co., 76 S. Car. 95 192
Ingram v. Colgan, 106 Cal. 113 191
v. Maine Water Co., 98 Maine 566 188
v. State, 39 Ala. 247 88, 90, 120
Inland Finance Co. v. Ingersoll Co., 124 Wash. 72 90
Inland Fisheries v. Holyoke Power Co., 104 Mass. 446 150
Inland Steel Co. v. Yedinak, 172 Ind. 423 114
Inspiration Consol. Cop. Co. v. New Keystone Cop. Co., 16 Ariz. 257 179, 180
Insurance Co. of N. A. v. New Orleans, Fed. Cas. No. 7052 142
v. Welch (Okla.), 154 Pac. 48 142
Inszkewicz v. Luther, 30 R. I. 570 115
International &c. R. Co. v. Haddox, 36 Tex. Civ. App. 385 149
International Bridge Co. v. New York, 254 U. S. 126 150, 159
International Harvester Co. v. Kentucky, 234 U. S. 216 132
v. Missouri, 234 U. S. 199 108, 153, 223
International Merc. Marine Co. v. Stranahan, 155 Fed. 428 91

[*References are to Sections.*]

International Paper Co. v. Massachusetts, 246 U. S. 135 142
International Text Book Co. v. Lynch, 218 U. S. 664 142
v. Peterson, 218 U. S. 664 142
International Trust Co. v. A. Leschen & Sons Rope Co., 41 Colo. 299 142
Interstate Amusement Co. v. Albert, 239 U. S. 560 142
Interstate Commerce Commn. v. Brimson, 154 U. S. 447 87
v. Illinois Central R. Co., 215 U. S. 452 91
v. Louisville &c. R. Co., 227 U. S. 88 90
v. Northern Pac. R. Co., 216 U. S. 538 90
Interstate Consol. St. R. Co. v. Massachusetts, 207 U. S. 79 160
Interurban R. & Term. Co. v. Public Utils. Commn., 98 Ohio St. 287 136, 145
Intoxicating Liquor Cases, In re, 25 Kans. 751 120
Iola v. Missouri Pac. R. Co., 97 Kans. 242 149
Iowa Cent. R. Co. v. Iowa, 160 U. S. 389 88, 96, 110
Iron City Bank v. Pittsburgh, 37 Pa. 340 142, 144
Irvin, Ex parte, 106 Ohio St. 50 114
Irving v. Ford, 179 Mass. 216 102
Island Coal Co. v. Swaggerty, 159 Ind. 664 96
Island Falls Water Co., In re, 118 Maine 397 90
Ives v. South Buffalo R. Co., 201 N. Y. 271 88, 94, 96, 97, 98, 152, 218, 226, 232, 234
Ivey v. State (Okla. Cr.), 223 Pac. 401 120

J

Jack v. Kansas, 199 U. S. 372 8, 90
Jackman v. Rosenbaum Co., 263 Pa. 158 114, 123
v. Rosenbaum Co., 260 U. S. 22 231
Jackson v. Bell, 143 Tenn. 452 90
v. Breeland, 103 S. Car. 184 173, 174
v. Cravens, 235 Fed. 212 123
v. Denver, 41 Colo. 362 89
v. Griswold, 5 Johns. (N. Y.) 139 88
v. State, 148 Ga. 351 120
v. Walsh, 75 Md. 304 139
v. Wood, 2 Cow. (N. Y.) 819 7, 84
Jackson, Ex parte, 96 U. S. 727 110
Jackson Lumber Co. v. McCrimmon, 164 Fed. 759 88, 89
Jackson Street, In re, 62 Wash. 432 87
Jacksonville Elec. L. Co. v. Jacksonville, 36 Fla. 229 204
Jacksonville Gas Co. v. Jacksonville, 286 Fed. 404 90
Jacobs v. Clearview Water Supply Co., 220 Pa. 388 193
Jacobs v. Paris, 131 Ark. 28 89
Jacobs, In re, 13 Idaho 720 116
Jacobs, In re, 98 N. Y. 98 124, 129, 214, 219
Jacobsen v. Superior Court, 192 Cal. 319 112
Jacobson v. Massachusetts, 197 U. S. 11 127, 128, 197, 218, 233
Jahn, In re, 55 Kans. 694 120
Jamaica v. Denton, 70 N. Y. S. 837 195
James v. Dubois, 16 N. J. L. 285 82
James Clark Distilling Co. v. Western Maryland R. Co., 219 Fed. 333 120
v. Western Maryland R. Co., 242 U. S. 311 120
Janes v. Reynolds, 2 Tex. 250 87
Janes, In re, 30 How. Pr. (N. Y.) 446 88
Januszewski, Ex parte, 196 Fed. 123 87, 91
Japanese Immigrant Case, 189 U. S. 86 90, 91
Jarvis v. State, 138 Ala. 17 104
Jarvis, In re, 66 Kans. 329 107
Jay v. Northern Pac. R. Co., 162 Wis. 458 149
Jay Burns Baking Co. v. Bryan, 264 U. S. 504 210, 216, 219, 229
Jefferson Branch Bank v. Skelly, 1 Black. (U. S.) 436 144
Jeffersonville R. Co. v. Gabbert, 25 Ind. 431 159
Jeffress v. Greenville, 154 N. Car. 490 171
Jeffrey Mfg. Co. v. Blagg, 90 Ohio St. 376 96
Jeffries v. Brown, 90 Kans. 495 151
Jenkins v. Andover, 103 Mass. 94 195, 196
Jenkins Tp. v. Public Serv. Commn., 65 Pa. Super. Ct. 122 145
Jensen v. Southern Pac. Co., 215 N. Y. 514 96
Jensen, Matter of, 44 App. Div. (N. Y.) 509 199
Jentzsch, Ex parte, 112 Cal. 468 116
Jerome v. New York E. J. P. Co., 124 App. Div. (N. Y.) 372 87
Jersey City v. Chason, 81 N. J. L. 315 107
Jessup, In re, 81 Cal. 408 102
Jeter v. Vinton-Roanoke Water Co., 114 Va. 769 176
Jilz, In re, 3 Mo. App. 243 104
J. L. Roper Lumber Co. v. Elizabeth City Lumber Co., 135 N. Car. 742 91
Job v. Alton, 189 Ill. 256 172
Jochen, Ex parte, 257 Fed. 200 87
Joel v. Bennett, 276 Ill. 537 151
John and Cherry Sts., Matter of, 19 Wend. (N. Y.) 659 68, 88
John Hampden's Case, 3 Howell St. Tr. (1637) 825 29
John Hancock Mut. Life Ins. Co. v. Warren, 181 U. S. 73 147
Johnson v. Ackerson, 3 Daly (N. Y.) 430 94
v. Campbell, 49 Ill. 316 200

[*References are to Sections.*]

Johnson v. Colburn, 36 Vt. 693 198
v. Elliott (Tex. Civ. App.), 168 S. W. 968 120
v. Gearlds, 234 U. S. 422 131
v. Goodyear Min. Co., 127 Cal. 4 127, 152
v. Hanover Fire Ins. Co., 15 Fed. 97 151
v. Ocean View Cemetery, 198 App. Div. (N. Y.) 854 115
v. Peterson, 288 Fed. 735 89
v. Sayre, 158 U. S. 109 90
v. Southern Pac. Co., 11 Cal. App. 278 159
v. Stark, 24 Ill. 75 165, 179, 181
v. State, 81 Fla. 783 120
Johnson, Ex parte (Okla. Cr.), 201 Pac. 533 116
Johnson Pub. Co. v. Mills, 79 Miss. 543 122
Johnston v. Johnston & S. C. R. Co., 75 Pa. Super. Ct. 540 149
Joliff v. Muncie Elec. L. Co., 181 Ind. 650 180
Jones v. Board of Water Commrs., 34 Mich. 273 169
v. General Motors Acceptance Corp., 205 Ky. 227 151
v. Huxtable, 2 Q. B. Cas. (1867) 460 115
v. Jones, 12 Pa. 350 104
v. North Georgia Elec. Co., 125 Ga. 618 179, 193
v. People, 14 Ill. 196 88, 113, 120
v. People, 110 Ill. 590 152
v. Porters, Barradall (Va.) 93 32
v. Portland, 113 Maine 123 206
v. Portland, 245 U. S. 217 206, 228, 231
v. Rhea, 130 Va. 345 139
v. Richmond, 18 Gratt. (Va.) 517 128
v. Robbins, 8 Gray (Mass.) 329 71, 94, 96
v. State, 17 Ala. App. 444 120
v. Tremont Lumber Co., 139 La. 616 149
v. Union Guano Co., 264 U. S. 171 110
Jones, In re, 71 W. Va. 567 87, 128
Jones & Nimick Mfg. Co. v. Commonwealth, 69 Pa. St. 137 144
Jones' Heirs v. Perry, 18 Tenn. 59 93, 102
Joplin v. Southwest Missouri Light Co., 191 U. S. 150 204
Jordan v. Massachusetts, 225 U. S. 167 87, 91
Jorgenson v. Chicago &c. R. Co., 153 Wis. 108 149
Joslin Mfg. Co. v. Clarke, 41 R. I. 350 89
v. Providence, 262 U. S. 668 112, 204
Joslyn v. Pacific Mail S. S. Co., 12 Abbott. Pr. (N. S.) (N. Y.) 329 139
Judefind v. State, 78 Md. 510 116
Judy v. Thompson, 156 Ind. 533 91
Julien v. Model Bldg. L. &c. Assn., 116 Wis. 79 123
Junction R. Co. v. Philadelphia, 88 Pa. 424 169
Junqua, In re, 10 Cal. App. 602 114
Juragua Iron Co. v. United States, 212 U. S. 297 128
Justices v. Griffin &c. Rd. Co., 9 Ga. 475 180
J. W. French, The, 13 Fed. 916 90

K

Kahn v. Anderson, 255 U. S. 1 87
Kaiser, Application of, 171 Wis. 40 149
Kaiser Land &c. Co. v. Curry, 155 Cal. 638 91, 142, 145
Kalb-Gilbert Lumber Co. v. Cram, 57 Wash. 550 90
Kalloch v. Superior Court, 56 Cal. 229 96, 97
Kaminitsky v. Northeastern R. Co., 25 S. Car. 53 149
Kane v. New Jersey. 242 U. S. 160 142
Kankakee Stone &c. Co. v. Kankakee, 128 Ill. 173 172
Kansas v. Bradley, 26 Fed. 289 120
Kansas City v. Huling, 87 Mo. 203 88
Kansas City, M. &c. R. Co. v. Spencer, 72 Miss. 491 159
Kansas City Ordinance No. 39946, In re, 298 Mo. 569 203
Kansas City So. R. Co. v. Greer, 90 Ark. 531 159
v. Road Imp. Dist. No. 3, 266 U. S. 379 170
v. Road Imp. Dist. No. 6, 256 U. S. 658 170
Kansas Pac. R. Co. v. Mower, 16 Kans. 573 159
Karrick v. Cantrill, 277 Fed. 578 90
Kaufman v. Dostal, 73 Iowa 691 120
Kaukauna Water P. Co. v. Green Bay Co., 142 U. S. 254 180
Kaw Boiler Works v. Frymyer, 100 Okla. 81 151
Keeley v. Evans, 271 Fed. 520 90
Keen v. Waycross, 101 Ga. 588 207
Keene v. Roxbury (N. H.), 126 Atl. 7 171
Keithsburg v. Frick, 34 Ill. 405 185
Keller v. Corpus Christi, 50 Tex. 614 128
v. United States, 213 U. S. 138 8, 123
Kelly v. Conner, 122 Tenn. 339 120
v. Marshall, 69 Pa. St. 319 200
v. Pittsburg, 104 U. S. 78 86, 96
Kemmler, In re, 136 U. S. 436 96, 97, 108, 123
Kemp v. Neville, 10 C. B. (N. S.) (1861) 522 21
Kenly v. Washington County R. Co., 129 Md. 1 171
Kennard v. Louisiana, 92 U. S., 480 86, 96

[*References are to Sections.*]

Kennebec Water Dist. v. Waterville, 97 Maine 185 157
Kennedy, Ex parte, 42 Tex. Cr. 148 116
Kennedy Bros. v. Sinclair, 287 Fed. 972 107
Kenneke, Ex parte, 136 Cal. 527 115
Kenosha R. &c. R. Co. v. Marsh, 17 Wis. 13 141, 145, 156
Kent v. Quicksilver Min. Co., 78 N. Y. 159 139
Kentucky Live Stock Breeders Assn. v. Hagar, 120 Ky. 125 195
Kentucky Railroad Tax Cases, 115 U. S. 321 86, 89
Kentucky Union Co. v. Commonwealth, 219 U. S. 140 91
Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224 152
Kersey v. Terre Haute, 161 Ind. 471 191
Ketchum Coal Co. v. Carbon County, 48 Utah 342 87
v. Pleasant Valley Coal Co., 50 Utah 395 190
Key v. Goodwin, 4 Moore & Payne (C. P., 1830) 341 25
Kidd v. Pearson, 128 U. S. 1 120, 126
Kidd, In re, 5 Cal. App. 159 120
Kiesel v. Bybee, 14 Idaho 670 142
Kiley v. Chicago, M. &c. R. Co., 138 Wis. 215 96
v. Chicago, M. &c. R. Co., 142 Wis. 154 106
Killgore v. Zinkhan, 274 Fed. 140 88, 91
Kilpatrick v. Grand Trunk R. Co., 74 Vt. 288 96
Kimmel v. Gray, 196 Ill. App. 406 139
Kincaid v. Seattle, 74 Wash. 617 171
Kincaid's Appeal, In re, 66 Pa. 411 115
Kine v. Wilmington &c. R. Co., 8 Houst. (Del.) 185 149
King v. Abraham, 1 Show (K. B.) 49 29, 30, 96
v. Berchet, 1 Show (K. B.) 106 29, 30, 96
v. Hatfield, 130 Fed. 564 91
v. Mullins, 171 U. S. 404 91
v. Portland, 38 Ore. 402 88
v. University, 8 Mod. (1716) 148 25
King, Ex parte, 157 Cal. 161 224
King, In re, 46 Fed. 905 91
King Tonopah Min. Co. v. Lynch, 232 Fed. 485 88, 142, 151
Kingman v. Brockton, 153 Mass. 255 195
Kingman, Petitioner, 153 Mass. 566 202
Kingsbery v. Ryan, 92 Ga. 108 87
Kingsbury v. Chatham R. Co., 66 N. Car. 284 94
Kingston v. Anderson, 300 Ill. 577 171
Kinston v. Loftin, 149 N. Car. 255 89
Kipper v. State, 42 Tex. Cr. 613 104
Kirch v. United States, 255 Fed. 301 128
Kirk-Christy Co. v. American Assn., 128 Ky. 668 171
Kirkland v. State, 72 Ark. 171 89
Kirksey v. Wichita, 103 Kans. 761 122
Kirtland v. Hotchkiss, 100 U. S. 491 86
Kirven v. Virginia-Carolina Chem. Co., 145 Fed. 288 151
Kittanning Coal Co. v. Commonwealth, 79 Pa. St. 100 142
Klafter v. State Board, 259 Ill. 15 91
Klein v. Hutton (N. Dak.), 191 N. W. 435 90
Kluver v. Middlewest Grain Co., 44 N. Dak. 210 142, 151
Knapp v. Bullock Tractor Co., 242 Fed. 543 151
v. State, 125 Minn. 194 195
v. Supreme Commandery, 121 Tenn. 212 139
Knight v. Beyers, 70 Ore. 413 91
v. Triplett, Barradall (Va.) 127 32
Knight & Jillson Co. v. Miller, 172 Ind. 27 123
Knights v. Treasurer, 237 Mass. 493 195
Knisely v. Cotterel, 196 Pa. St. 614 108
Knoop v. Piqua Branch of State Bank, 1 Ohio St. 603 136
Knowlton v. Rock County, 9 Wis. 410 195
Knox v. Lee, 12 Wallace (U. S.) 457 57
Knox Bros. v. Wagner, 141 Tenn. 348 151
Knoxville v. Knoxville Water Co., 212 U. S. 1 216
v. Southern R. Co., 149 Tenn. 291 149
Knoxville &c. R. Co. v. Hicks, 68 Tenn. 442 144
Knoxville Iron Co. v. Harbison, 183 U. S. 13 152
Knoxville Water Co. v. Knoxville, 200 U. S. 22 204
Knutson v. Campbell River Mills, 300 Fed. 241 151
Kohl v. Lehlback, 160 U. S. 293 91
v. United States, 91 U. S. 367 195
Koser, Ex parte, 60 Cal. 177 116
Kracken v. State, 147 Ga. 198 120
Kramer v. Marks, 64 Pa. 151 124
Kraus v. American Tobacco Co., 283 Pa. 146 151
Kreps v. Brady, 37 Okla. 754 96
Kresser v. Lyman, 74 Fed. 765 91, 120
Kroon v. Jones, 198 Iowa 1270 175
Kroschel v. Munkers, 179 Fed. 961 107
Krueger v. Colville, 49 Wash. 295 91, 120
Krupp, Ex parte, 41 Tex. Cr. 355 104

[*References are to Sections.*]

Kuennan v. United States Fid. & Guar. Co., 159 Mich. 122 151
Kuenzli v. Stone, 112 Misc. (N. Y.) 125 145
Kulp v. Public Serv. Commn., 82 Pa. Super. Ct. 83 180
Kundinger v. Saginaw, 59 Mich. 355 89
Kunkle v. Franklin, 13 Minn. 127 200
Kunsberg v. State, 147 Ga. 591 120
Kuntz v. Sumption, 117 Ind. 1 89
Kurath v. Gove Automobile Co., 144 Wis. 480 91
Kurtz v. Moffitt, 115 U. S. 487 87
Kwock Seu Lum, Ex parte, 287 Fed. 363 91
Kyle v. Jenkins, 6 W. Va. 371 116

L

La Belle Iron Wks. v. United States, 256 U. S. 377 108
Labrake, Matter of, 60 N. Y. S. 571 199
Lace v. Smith, 34 R. I. 1 89
Lacher v. Venus, 177 Wis. 558 92
Lacoste v. Department of Conservation, 151 La. 909 107
v. Department of Conservation, 263 U. S. 545 108, 123
Ladd v. Minneapolis, St. P. &c. R. Co., 142 Wis. 165 106
v. Portland, 32 Ore. 271 144
Lafayette v. Cox, 5 Ind. 38 185
v. Cummins, 3 La. Ann. 673 103
v. Tanner, 149 La. 430 172
Lafayette Ins. Co. v. French, 18 How. (U. S.) 404 142, 151
La Fitte v. Fort Collins, 42 Colo. 299 120
Laguna Drainage Dist. v. Charles Martin Co., 144 Cal. 209 173
La Harpe v. Elm Tp. Gas &c. Co., 69 Kans. 97 180
Laird v. Pittsburg, 205 Pa. 1 195, 202
Lake Bowling Alley v. Richmond, 116 Va. 429 87
Lake County Water & L. Co. v. Walsh, 160 Ind. 32 204
Lake Drummond Canal & W. Co. v. Commonwealth, 103 Va. 337 144
Lake Erie &c. R. Co. v. Gossard, 14 Ind. App. 244 218
v. Heath, 9 Ind. 558 87
Lake Koen Nav. R. & I. Co. v. Klein, 63 Kans. 484 177
Lakes v. Goodloe, 195 Ky. 240 87
Lake Shore &c. R. Co. v. Clough, 242 U. S. 375 174
v. Smith, 173 U. S. 684 90, 114, 148, 162
Lake View v. Letz, 44 Ill. 81 115
v. Rose Hill Cemetery Co., 70 Ill. 191 114
Lamar v. Taylor, 141 Ga. 227 151
Lamar Water & Elec. L. Co. v. Lamar, 128 Mo. 188 204
Lamb v. Lamb, Fed. Cas. No. 8018 142
Lambert v. National Hog Co., 263 Pa. 354 90
Lamborn v. Bell, 18 Colo. 346 192
Landell v. State (N. J.) 128 Atl. 380 87, 180
Landon v. Litchfield, 11 Conn. 251 144
Land's Estate, In re, 166 Cal. 538 87
Lang v. People, 14 Mich. 439 88
Langdon v. Walla Walla, 112 Wash. 446 176
Langford v. Ramsey County, 16 Minn. 375 89
Lansing v. Lansing City Elec. R. Co., 109 Mich. 123 149
v. Michigan Power Co., 183 Mich. 400 155, 157
Lanz-Owen v. Garage Equip. Co., 151 Wis. 555 151
Lappin v. District of Columbia, 22 App. D. C. 68 107
Laredo v. International Bridge &c. Co., 66 Fed. 246 122
Larsen v. Rice, 100 Wash. 642 131
Larson v. Christianson, 14 N. Dak. 476 88
Latah County v. Peterson, 3 Idaho 398 171
Lathrop v. Racine, 119 Wis. 461 169
v. Stedman, 42 Conn. 583 145
Lauderdale County v. Fargason, 75 Tenn. 153 185
Laughlin v. Portland, 111 Maine 486 206
Laughton v. Putney, 43 Vt. 485 200
Laurel Hill Cemetery v. San Francisco, 216 U. S. 358 115, 218, 231, 234
Laurens v. Anderson, 75 S. Car. 62 200
Lauter v. Jarvis-Conklin Mtg. T. Co., 85 Fed. 894 151
Law v. Railroad Commn., 184 Cal. 737 90, 148
Law, Ex parte, 35 Ga. 285 116
Lawrence v. Hicks, 8 Gill. & J. (Md.) 386 104
v. McAlvin, 109 Mass. 311 198
v. Rutland R. Co., 80 Vt. 370 152, 159
Lawson v. Halifax Tonopah Min. Co., 36 Nev. 591 96
v. Jeffries, 47 Miss. 686 104
v. Milwaukee &c. R. Co., 30 Wis. 597 186
Lawton v. Steele, 152 U. S. 133 90, 115, 125, 126, 129
Lea v. Louisville &c. R. Co., 135 Tenn. 560 180
Leach v. State (Tex. Cr. App.), 62 S. W. 422 104
Leathers v. Craig (Tex. Civ. App.), 228 S. W. 995 171
Leavenworth County v. Miller, 7 Kans. 479 179, 184
Leavitt v. Morris, 105 Minn. 170 213, 217
v. Thompson, 56 Barb. (N. Y.) 542 124

[*References are to Sections.*]

Le Clair v. White, 117 Maine 335 96, 120
Lee v. Bude & T. Junc. R. Co., 40 L. J. C. P. 285 21
v. March, 230 Pa. St. 351 128
v. New Jersey, 207 U. S. 67 115
Leecraft v. Texas Co., 281 Fed. 918 107, 113
Leep v. St. Louis, I. M. &c. R. Co., 58 Ark. 407 152, 159
Leeper v. State, 103 Tenn. 500 122
v. Texas, 139 U. S. 462 96, 108
Lees v. United States, 150 U. S. 476 91
Leesburg v. Putnam, 103 Ga. 110 203
Leete v. New York, N. H. &c. R. Co., 87 Conn. 57 159
Legal Tender Cases, 12 Wall. (U. S.) 457 76, 122, 124
Lehigh Water Co.'s Appeal, In re, 102 Pa. 515 204
Lehman v. Robinson, 59 Ala. 219 89
Leinger v. Reichle, 148 N. E. (Ill.) 384 88
Leisy v. Hardin, 135 U. S. 100 123
Lemieux v. Young, 211 U. S. 489 90
Lem Moon Sing v. United States, 158 U. S. 538 91
Lem Woon v. Oregon, 229 U. S. 586 96
Lent v. Tillson, 72 Cal. 404 89
v. Tillson, 140 U. S. 316 169
Leonard v. American Life & A. Co., 139 Ga. 274 112
v. Middleborough, 198 Mass. 221 198
v. Reed, 46 Colo. 307 107
v. State, 100 Ohio St. 456 114, 129
Less Land Co. v. Fender, 119 Ark. 20 174
Levin v. Burlington, 129 N. Car 184 128
Levins v. Sleator, 2 G. Green (Iowa) 604 104
Levy Leasing Co. v. Siegel, 230 N. Y. 634 132
v. Siegel, 258 U. S. 242 130, 132, 216
Lewinsky, Ex parte, 66 Fla. 324 120
Lewinsohn v. United States, 278 Fed. 421 87, 120
Lewis v. Hudson County, 37 N. J. L. 254 198
v. McGuire, 66 Ky. 202 128
v. Northern Pac. R. Co., 36 Mont. 207 152
v. Webb, 3 Maine 326 104
Lewis County v. Gordon, 20 Wash. 80 174
Lewis Pub. Co. v. Morgan, 229 U. S. 288 88, 108, 110
Lexington v. McQuillan's Heirs, 9 Dana (Ky.) 513 169, 171
L'Hote v. New Orleans, 177 U. S. 587 123, 127, 213, 219
Liberty Bell, The, 23 Fed. 843 195
Liberty Oil Co. v. Condon Nat. Bank, 260 U. S. 235 87
Liberty Warehouse Co. v. Burley Tobacco Gr. Assn. (Ky.) 271 S. W. 695 87, 114
License Cases, 5 How. (U. S.) 504 113, 114, 115
Li Dick, Ex parte, 176 Fed. 998 91
Lieber v. Rogers, 37 Okla. 614 144
Lien v. Board of County Commrs., 80 Minn. 58 173
Light v. Canadian County Bank, 2 Okla. 543 87, 110
Lilly v. Indianapolis, 149 Ind. 648 195
Limoneira Co. v. Railroad Commn., 174 Cal. 232 162
Lincecum v. Lincecum, 3 Mo. 441 102
Lincoln v. Chicago & A. R. Co., 262 Ill. 11 149
v. Smith, 27 Vt. 328 118
Lincoln & D. C. Irr. Dist. v. McNeal, 60 Nebr. 613 176
Lindenmuller v. People, 33 Barb. (N. Y.) 548 116
Lindsay v. Lindsay, 257 Ill. 328 87
v. Street Commissioners, 2 Bay (S. Car.) 38 80, 81, 171
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 177, 217, 222
Linn v. Chambersburg, 160 Pa. St. 511 204
Lin Sing v. Washburn, 20 Cal. 534 103
Linton v. Stanton, 12 How. (U. S.) 423 232
Lipke v. Lederer, 259 U. S. 557 89
Lipscomb v. Bank of Tatum, 120 S. Car. 147 87
Liquor Transp. Cases, 140 Tenn. 582 120
Li Sing v. United States, 180 U. S. 486 91
Litchfield &c. R. Co. v. Alton, & S. R. R., 305 Ill. 388 180
Lithuanian Workers' Lit. Soc., Matter of, 196 App. Div. (N. Y.) 262 141
Little Falls Elec. Co. v. Little Falls, 102 Fed. 663 204
Littleton v. Fritz, 65 Iowa 488 120
Liu Hop Fong v. United States, 209 U. S. 453 91
Liverpool & L. & G. Ins. Co. v. Clunie, 88 Fed. 100 153
Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566 142
Livingston v. Darlington, 101 U. S. 407 195, 221
v. Moore, 7 Pet. (U. S.) 550 62
Livingston Waterworks v. Livingston, 53 Mont. 1 122
Loan Assn. v. Topeka, 20 Wall. (U. S.) 655 77, 81, 189, 191, 209
Lochner v. State, 111 Md. 660 120
Lochner v. New York, 198 U. S. 45 83, 115, 123, 218, 220, 226, 227
Locke's Appeal, 72 Pa. 491 120
Lockhart v. Anderson, 62 Okla. 209 106
Loewenthal v. Rubber Reclaiming Co., 52 N. J. Eq. 440 140

[*References are to Sections.*]

Logan v. Stogdale, 123 Ind. 372 171
Lombard v. West Chicago Park Commrs., 181 U. S. 33 169
London v. Wood, 12 Mod. (1614) 669 20
London, Ex parte, 73 Tex. Cr. 208 122
Londonderry v. Berger, 7 Leg. Gaz. (Pa.) 231 144
London Dyers', Case of, 2 Dwarris, Statutes 807 26
Londoner v. Denver, 52 Colo. 15 202
v. Denver, 210 U. S. 373 89
Long Island R. Co. v. Sherwood, 205 N. Y. 1 180
Long Island Water S. Co. v. Brooklyn, 166 U. S. 685 89, 91, 112, 176, 204
Long Island Water S. Co., In re, 143 N. Y. 596 89
Long Sault Dev. Co. v. Kennedy, 212 N. Y. 1 193
Longwell Transfer v. Elliott (Tex. Civ. App.), 267 S. W. 346 122
Longyear v. Buck, 83 Mich. 236 159
Looker v. Maynard, 179 U. S. 46 140, 154
Lopez v. Howe, 259 Fed. 401 91
Lord v. Chicago, 274 Ill. 313 149
v. Equitable Life Assur. Soc., 194 N. Y. 212 139, 146
v. Litchfield, 36 Conn. 116 144
Lord Cromwell's Case, 4 Coke (1578) 12 20
Lore v. American Mfg. Co., 160 Mo. 608 96
Lorrilard Co. v. Scott, 184 Ky. 312 142
Los Angeles v. Allen, 32 Cal. App. 553 112
v. Huntley, 84 Wash. 155 90
v. Lewis, 175 Cal. 777 207, 208
v. Los Angeles Pac. Co., 31 Cal. App. 100 180
v. Zeller, 176 Cal. 194 89
Lossing v. Hughes (Tex. Civ. App.), 244 S. W. 556 106
Lothrop v. Stedman, 42 Conn. 583 145
Lott v. Hubbard, 44 Ala. 593 89
v. Pittman, 243 U. S. 588 91
Lottawanna, The, 21 Wall. (U. S.) 558 109
Loughbridge v. Harris, 42 Ga. 500 187, 188, 192
Louisiana v. McAdoo, 234 U. S. 627 91
v. Mayor of New Orleans, 109 U. S. 285 86
v. Pilsbury, 105 U. S. 278 168
Louisiana &c. R. Co. v. State, 91 Ark. 358 119
Louisiana R. & Nav. Co. v. Railroad Commn., 121 La. 848 149
Louisiana State Bd. of Agric. & Immigr. v. Tanzmann, 140 La. 756 90
Louisville v. Savings Bank, 104 U. S. 469 185
Louisville v. University, 54 Ky. 642 **154, 155**
Louisville &c. R. Co. v. Barber Asphalt Pav. Co., 197 U. S. 430 170
v. Bosworth, 230 Fed. 191 107
v. Covington, 184 Ky. 811 149
v. Davidson, 33 Tenn. 637 167, 185
v. Finn, 235 U. S. 601 90
v. Garrett, 231 U. S. 298 90, 148
v. Gaston, 216 U. S. 418 142
v. Higdon, 234 U. S. 592 91
v. Hopkins County, 153 Ky. 718 149
v. Kentucky, 183 U. S. 503 88, 90, 91
v. Louisville (Ky. App.), 122 S. W. 849 119
v. McChord, 103 Fed. 216 90
v. Melton, 218 U. S. 36 96
v. Railroad Commn., 19 Fed. 679 90
v. Railroad Commn., 196 Fed. 800 90
v. Schmidt, 177 U. S. 230 88, 89
v. Siler, 186 Fed. 176 90, 91
v. Timmons, 116 Tenn. 29 159
v. Western Union Tel. Co., 207 Fed. 1 87
v. Western Union Tel. Co., 250 U. S. 363 89
v. Woodson, 134 U. S. 614 96
Louisville Bank v. Commonwealth, 142 Ky. 690 140, 145
Louisville School Board v. King, 127 Ky. 824 91
Louisville Tobacco Warehouse Co. v. Commonwealth, 106 Ky. 165 142
Louisville Water Co. v. Clark, 143 U. S. 1 144
Lovato v. New Mexico, 242 U. S. 199 87
Love v. Atchison, T. &c. R. Co., 185 Fed. 321 90
v. Yazoo City, 91 Miss. 535 205
Love, In re, 205 App. Div. (N. Y.) 363 120
Loverin & Browne Co. v. Travis, 135 Wis. 322 142
Lovillia v. Cobb, 126 Iowa 557 116
Low v. Rees Print Co., 41 Nebr. 127 **127**
Low, In re, 233 N. Y. 334 180
Lowe v. Connoy, 120 Wis. 151 90
v. Kansas, 163 U. S. 81 94, 96
Lowe, In re, 54 Kans. 757 122
Lowell v. Boston, 111 Mass. 454 197, 203
v. Oliver, 8 Allen (Mass.) 247 200
Lowenstein v. International R. Co., 140 N. Y. S. 159 160
Lower Vein Coal Co. v. Industrial Board, 255 U. S. 144 96, 199, 219, 235
Low Foon Yin v. United States, 145 Fed. 791 91
Lowrey v. Central Falls, 23 R. I. 354 88, 91
Lowrie, In re, 8 Colo. 499 97

[*References are to Sections.*]

Lowry v. Rainwater, 70 Mo. 152 124
Low Wah Suey v. Backus, 225 U. S. 460 88, 91
Lubetich v. Pollock, 6 Fed. (2d) 237 115
Lucas v. Ashland Light, M. & P. Co., 92 Nebr. 550 193
v. Macomb, 49 Ill. App. 60 107
Lucas County v. State, 75 Ohio St. 114 196
Lucchesi v. Commonwealth, 122 Va. 872 120
Lucia v. Utterback, 197 Iowa 1181 87
Lucifer Coal Co. v. Buster, 64 Colo. 179 145
Ludwig v. Western Union Tel. Co., 216 U. S. 146 143, 146
Lukens v. International Life Ins. Co., 269 Mo. 574 142
Lumbard v. Stearns, 4 Cush. (58 Mass.) 60 176, 187
Lumsden v. Cross, 10 Wis. 282 169
Lund v. Newton County, 47 Ind. App. 175 88
Lung Wing Wun, Ex parte, 161 Fed. 211 91
Lusk v. State, 47 Okla. 648 149
Luther v. State, 83 Nebr. 455 235
Lux v. Haggin, 69 Cal. 255 176
Luxton v. North River Bridge Co., 153 U. S. 525 180
Lycoming v. Union, 15 Pa. St. 166 199
Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526 142
Lyford v. Laconia, 75 N. H. 220 195, 202
Lynch v. Baltimore &c. R. Co., 240 Ill. 567 159
v. Hoffman, 7 W. Va. 553 116
Lyons v. Longmont, 54 Colo. 112 176
Lyons Cemetery Assn., Matter of, 93 App. Div. (N. Y.) 19 194

M

Mabee v. McDonald, 107 Tex. 139 10, 110
McAneny, Matter of, 190 N. Y. S. 92 148
Macartney v. Shipherd, 60 Ore. 133 91
McAunich v. Mississippi &c. R. Co., 20 Iowa 338 96
Macbeth-Evans Glass Co. v. Van Blarican, 176 Ind. 69 152
McBride v. Chicago, 22 Ill. 574, 168
v. State Rev. Agt., 70 Miss. 716 91
McCabe v. Atchison T. &c. R. Co., 235 U. S. 151 221
McCallie v. Chattanooga, 40 Tenn. (3 Head.) 317 185
McCalmont v. Allegheny County, 29 Pa. St. 417 198
McCarrol v. Weeks, 5 Hay (Tenn.) 247 89
McChord v. Louisville &c. R. Co., 183 U. S. 483 90
McClelland v. Denver, 36 Colo. 486 116
McClement v. Supreme Court I. O. F., 222 N. Y. 470 144
McClenaghan v. Curwen, 6 Bin. (Pa.) 509 171, 180
McCloskey v. Heinen (Tex. Civ. App.), 266 S. W. 193 171
McClure v. Owen, 26 Iowa 243 182
v. Topf & Wright, 112 Ark. 342 120
McCollum v. McConaughy, 141 Iowa 172 232
McConnell v. Bell, 121 Tenn. 198 88, 110
v. Hamm, 16 Kans. 228 190
McCord v. State, 2 Okla. Cr. 214 114
McCormick's Estate, In re, 72 Ore. 608 87
McCoy v. Union Elev. R. Co., 247 U. S. 354 80, 112
McCray v. Miller, 78 Okla. 16 91
v. United States, 195 U. S. 27 108, 165
McCulloch v. Maryland, 4 Wheat. (U. S.) 316 183
McCullough v. Brown, 41 S. Car. 220 203
v. Franklin, 59 N. J. L. 106 149
McCully v. Chicago, B. &c. R. Co., 212 Mo. 1 160
McCutcheon v. Terminal Stn. Commn., 217 N. Y. 127 149
McDaniel v. Commonwealth (Ky. App.), 248 S. W. 895 120
McDonald v. McBee, 243 U. S. 90 110
v. Red Wing, 13 Minn. 38 128
M'Donough v. Millaudon, 3 How. (U. S.) 693 232
McFarland v. American Sugar Ref. Co., 241 U. S. 79 108
v. McKnight, 45 Ky. 500 91
McGarvey v. Swan, 17 Wyo. 120 224
McGavock v. Omaha, 40 Nebr. 64 89
McGee v. Mathis, 4 Wall. (U. S.) 143 144
McGee, Ex parte, 44 Nev. 23 120
McGhee v. Walsh, 249 Mo. 266 172
McGibbory v. Mancaster, 286 Fed. 129 87
McGinnis v. McGinnis, 289 Ill. 608 91
McGlone v. Womack, 129 Ky. 274 159
McGoon v. Scales, 9 Wall. (U. S.) 23 151
McGowan v. McDonald, 111 Cal. 57 151
McGraw v. Marion, 98 Ky. 673 107
McGregor v. Hogan, 263 U. S. 234 88, 89
McGrew v. Missouri Pac. R. Co., 230 Mo. 496 90
McGuire v. Parker, 32 La. Ann. 832 107
McGunnegle v. State, 6 Mo. 367 104
McGunnigle v. McKee, 77 Pa. St. 81 102

[*References are to Sections.*]

McHenry v. Alford, 168 U. S. 651 142
McIntosh v. State, 56 Tex. Cr. 134 104
McIntosh Coal Co. v. Blue Grass Coal Co., 203 Ky. 802 171
Mack v. Westbrook, 148 Ga. 690 91, 120
v. Workingmen's Bldg. & L. Assn., 5 Ky. L. 520 104
McKamie v. Baskerville, 86 Tenn. 459 102
McKane v. Durston, 153 U. S. 684 91
Mackay v. New York, N. H. &c. R. Co., 82 Conn. 73 139
Mackay Telegraph & Cable Co. v. Little Rock, 250 U. S. 94 142
McKee v. Chautauqua Assembly, 130 Fed. 536 139
McKee, In re, 19 Utah 231 87
McKeesport v. Pittsburg, M. & O. R., 213 Pa. 542 149
McKeever v. Jenks, 59 Iowa 300 89, 96, 178
MacKenzie v. Wooley, 39 La. Ann. 944 190
McKeon v. New York, N. H. &c. R. Co., 75 Conn. 343 114
Mackey v. Reeves, 42 S. Dak. 340 199
McKinley v. United States, 249 U. S. 397 128
McKinney v. Memphis Overton Hotel Co., 12 Heisk. (Tenn.) 104 106
Macklin v. State, 53 Tex. Cr. 197 104
McLane v. Granger, 74 Iowa 152 120
McLaren v. Pennington, 1 Paige (N. Y. Chan.) 102 137
McLaughlin v. Barr, 191 Ky. 346 91
v. New York City R. Co., 106 App. Div. (N. Y.) 1 160
v. State, 45 Ind. 338 120
McLaughlin, In re, 87 N. J. Eq. 138 87
McLean v. Arkansas, 211 U. S. 539 123, 127, 152, 217, 226, 229
McLeod v. Receveur, 71 Fed. 455 89, 91
McLure's Estate, In re, 68 Mont. 556 87
McManus v. Burrows, 280 Mo. 327 96
McMasters v. Commonwealth, 3 Watts (Pa.) 292 169
McMechan v. Baltimore, 2 Harr. & J. (Md.) 41 82
McMeekin v. Central Carolina Power Co., 80 S. Car. 512 193
McMillan v. Carter, 6 Mont. 215 89
v. Noyes, 75 N. H. 258 188, 193
v. Sims, 132 Wash. 265 115
McMillen v. Anderson, 95 U. S. 37 86, 89
McNamara's Estate, In re, 166 Mich. 451 87
McNaught, In re, 1 Okla. Cr. 528 96
McNealy v. Gregory, 13 Fla. 417 104
v. Vidalia, 157 La. 338 88
McNichol v. United States Merc. Rep. Agency, 74 Mo. 457 151
McNulty v. California, 149 U. S. 645 96
Macon v. Anderson, 155 Ga. 607 88
v. Patty, 57 Miss. 378 168, 171, 172
Macon &c. R. Co. v. Gibson, 85 Ga. 1 139
McPhee's Estate, In re, 154 Cal. 385 91
McPherson, In re, 104 N. Y. 306 89
McRae v. Wilmington &c. R. Co., 47 N. Car. 186 103, 122
McSween v. Fort Worth (Tex. Civ. App.), 129 S. W. 206 128
McTwiggan v. Hunter, 19 R. I. 265 89
McWhorter v. Chattooga County, 154 Ga. 289 90
Maddox v. Graham, 59 Ky. 56 181, 185
Madera County v. Raymond Granite Co., 139 Cal. 128 171
Madera Irrigation Dist., In re, 92 Cal. 296 176
Madera Sugar Pine Co. v. Industrial Acc. Commn., 262 U. S. 499 96, 199
Madera Waterworks v. Madera, 228 U. S. 454 204
Madison v. Alton, G. &c. Trac. Co., 235 Ill. 346 149
Madison, W. &c. R. Co. v. Reynolds, 3 Wis. 287 148, 154
Maffet v. Quine, 93 Fed. 347 180
Maggs v. Hunt, 12 Moore (C. P., 1827) 357 25
Maginnis v. Knickerbocker Ice Co., 112 Wis. 385 180
Magnola Metal Co. v. Savannah Supply Co., 157 N. Y. S. 355 151
Magnolia Bank v. Pike County, 111 Miss. 857 142
Maguiar v. Henry, 84 Ky. 1 94
Maguire v. Reardon, 41 Cal. App. 596 90
v. Reardon, 255 U. S. 271 90
Maguire, In re, 57 Cal. 604 127
Mahon v. Board of Education, 171 N. Y. 263 199
Mah Wong Gee, In re, 47 Fed. 433 91
Maier, Ex parte, 103 Cal. 476 90
Major Creek Lumber Co. v. Johnson, 99 Ore. 172 142
Mallett v. North Carolina, 181 U. S. 597 91
Mallory v. Virginia Colony, 123 Va. 205 90
Malone v. Williams, 118 Tenn. 390 88, 106
Mamaux v. United States, 264 Fed. 816 104

[*References are to Sections.*]

Mana, In re, 178 Cal. 213 104
Manchester v. Board of Water Commrs., 241 U. S. 649 175, 176
Manchester v. Burns, 45 N. H. 482 200
Manchester Fire Ins. Co. v. Herriott, 91 Fed. 711 142
Manchester, In re, 87 Conn. 193 179
Manderscheid v. Plymouth Co. Dist. Ct., 69 Iowa 240 87
Mandeville v. Band, 111 La. 806 120
Manford v. Menil Singh, 40 Cal. App. 700 152
Mangold v. St. Louis, M. & R. Co., 116 Mo. App. 606 159
Manhattan R. Co. v. Astor, 56 56 Misc. (N. Y.) 353 180
v. Mayor of New York, 35 N. Y. S. 505 157
Manhattan Real Est. Co. v. Fitz, 137 N. Y. S. 864 108
Manheim Borough v. Manheim Water Co., 229 Pa. 177 157
Manigault v. Springs, 199 U. S. 473 112, 187
Manistee &c. R. Co. v. Railroad Commissioner, 118 Mich. 349 144
Manitowoc v. Manitowoc & N. Trac. Co., 145 Wis. 13 148
Manners v. Pern, 10 Mod. (1714) 156 25
v. Waterbury, 86 Conn. 573 89
Manning v. Bruce, 186 Mass. 282 195, 197
v. Devil's Lake, 13 N. Dak. 47 181
Mansker v. Astoria, 100 Ore. 435 115
Manufacturers' Light & H. Co. v. Ott, 215 Fed. 940 90
Maples v. State, 203 Ala. 153 91, 116
Marasso v. Van Pelt, 77 Fla. 432 120
Marblehead Land Co. v. Superior Court, 62 Cal. App. 408 112
Marbury v. Madison, 1 Cranch. (U. S.) 137 217
March v. State, 44 Tex. 64 94
Marchant v. Baltimore, 146 Md. 513 180
v. Pennsylvania R. Co., 153 U. S. 380 89
Marconi Wireless Tel. Co. v. Commonwealth, 218 Mass. 558 142
Marcus Brown Holding Co. v. Feldman, 256 U. S. 170 107, 130, 131, 132, 145
v. Feldman, 269 Fed. 306 224
Marin Mun. Water Dist. v. Marin Water & P. Co., 178 Cal. 308 89, 112
Marion Tp. Grav. Rd. Co. v. Sleeth, 53 Ind. 35 139
Market Street, In re, 49 Cal. 546 169
Market Street R. Co. v. Hellman, 109 Cal. 571 139
v. Pacific Gas & Elec. Co., 6 Fed. (2d) 633 91
Markham v. Carver, 188 N. Car. 615 89
Markle v. Town Council, 14 Ohio 586 120
Markley v. Mineral City, 58 Ohio St. 430 190
Marks v. State, 159 Ala. 71 120
Marmet v. State, 45 Ohio St. 63 91
Marr v. Enloe, 1 Yerg. (Tenn.) 452 81, 100
Marschall, In re, 287 Fed. 187 87
Marshall v. McDaniel, 75 Ky. 378 88, 91
Marshall & Bruce Co. v. Nashville, 109 Tenn. 495 110
Marsh Min. Co. v. Inland Empire Co., 30 Idaho 1 190
Martin v. Bennett, 291 Fed. 626 88
v. Blattner, 68 Iowa 286 120
v. District of Columbia, 205 U. S. 135 170
v. O'Brien, 34 Miss. 21 122
v. Pittsburg &c. R. Co., 203 U. S. 284 96, 109
v. Remington-Martin Co., 95 App. Div. (N. Y.) 18 139
v. State, 143 Ind. 545 152
v. State, 23 Nebr. 371 91
v. Texas, 200 U. S. 316 104
Martin's Exrs. v. Martin, 25 Ala. 201 93
Marvin v. Trout, 199 U. S. 212 89, 91
Maryland Distilling Co. v. Miles, 263 Fed. 597 120
Mason v. Harper's Ferry Bridge Co., 17 W. Va. 396 157
v. Messenger, 17 Iowa 261 10, 94, 95
v. Missouri, 179 U. S. 328 217
Mason City &c. R. Co. v. Board of Supervisors, 144 Iowa 10 174
Massachusetts v. Mellon, 262 U. S. 447 165, 190, 191
Massachusetts Bond. & Ins. Co. v. Chorn, 274 Mo. 15 142
Massachusetts General Hosp. v. Belmont, 233 Mass. 190 144
v. State Mut. Life Assur. Co., 4 Gray (Mass.) 227 140
Massey v. Arkansas & M. Highway Dist., 163 Ark. 63 89
Massie v. Cassna, 239 Ill. 352 114
Matheny v. Golden, 5 Ohio St. 361 144
Mather v. Ottawa, 114 Ill. 659 190
Mathews v. Hedlund, 82 Nebr. 825 91
v. Kalamazoo Bd. of Educa., 127 Mich. 530 114
v. People, 202 Ill. 389 127
Mathison v. Minneapolis St. R. Co., 126 Minn. 286 96
Matlock v. Bloomington Water Co., 146 N. E. (Ind.) 852 176
Matthews v. Belfast Mfg. Co., 35 Wash. 662 180
v. Board of Corp. Commrs., 97 Fed. 400 162

[*References are to Sections.*]

Matthews v. Matthews, 240 N. Y. 28 88
v. Theological Sem., 2 Brewst. (Pa.) 541 142
Mauldin v. Greenville, 33 S. Car. 1 204
Maxwell v. Dow, 176 U. S. 581 87, 96
v. Miami, 87 Fla. 107 88
v. Page, 23 N. Mex. 356 89
May v. Memphis Branch R. Co., 48 Ga. 109 141
Maydwell v. Louisville, 116 Ky. 885 202
Maynard v. Hill, 125 U. S. 190 104
Mayo v. Dover & F. V. Fire Co., 96 Maine 539 204
v. Wilson, 1 N. H. 53 79, 93, 116
Mayor v. Dearmon, 34 Tenn. 103 98
v. Norwich &c. R. Co., 109 Mass. 103 160
v. Tenth Nat. Bank, 111 N. Y. 446 198
v. Twenty-third St. R. Co., 113 N. Y. 311 144
v. Yuille, 3 Ala. 137 115
Mayor, Application of, 11 Johns. (N. Y.) 77 168
Mayor, In re, 99 N. Y. 569 202
Mays v. Seaboard Air Line R., 75 S. Car. 455 180
Meacham v. Bear Valley Irrig. Co., 145 Cal. 606 88, 91
Mead v. Acton, 139 Mass. 341 200
Meade v. Portland, 200 U. S. 148 157
Meade Fibre Co. v. Varn, 3 Fed. (2d) 520 151
Meador, In re, Fed. Cas. No. 9375 87
Meadowcroft v. People, 163 Ill. 56 114
Meadow Dam Co. v. Gray, 30 Maine 547 150
Meadows v. Gulf &c. R. Co., 48 Tex. Civ. App. 466 90
Meadow's Will, In re, 185 N. Car. 99 87
Mechanics' & Traders' Bank v. Debolt, 1 Ohio St. 591 136
Mechanics' B. & L. Assn. v. Coffman, 110 Ark. 269 151
Mechanicville v. Stillwater &c. St. R. Co., 174 N. Y. 507 149
Meehan v. Board of Excise, 73 N. J. L. 382 120
Meffert v. State Board of Med. Reg., 66 Kans. 710 123
Mehlos v. Milwaukee, 156 Wis. 591 114
v. Milwaukee, 160 Wis. 339 88
Memphis v. Hastings, 113 Tenn. 142 202
Memphis &c. R. Co. v. Berry, 41 Ark. 436 144
Memphis Cotton Oil Co. v. Tolbert, 171 S. W. (Tex. Civ. App.) 309 96
Menasha Woodenware Co. v. Railroad Commn., 167 Wis. 19 180
Menges v. Dentler, 33 Pa. 495 82
Mercantile Trust Co. v. Texas &c. R. Co., 51 Fed. 529 90
Mercer v. Floyd, 24 Misc. (N. Y.) 164 199
Mercer County v. Wolff, 237 Ill. 74 195
Merchants' Exch. v. Missouri, 248 U. S. 365 122
Merchants' Nat. Bank v. Pennsylvania, 167 U. S. 461 89
Merchantville v. Camden & S. R. Co., 95 N. J. L. 511 119
Merrick v. Amherst, 12 Allen (Mass.) 500 195
v. Halsey, 242 U. S. 568 151
Merrill v. Plainfield, 45 N. H. 126 199
v. Sherburne, 1 N. H. 199 104
Merriman v. New York, 227 N. Y. 279 89
Messer, Ex parte, 87 Fla. 92 88
Metropolis Theatre Co. v. Chicago, 228 U. S. 61 222
Metropolitan Bd. of Excise v. Barrie, 34 N. Y. 657 120
Metropolitan Bd. of Health v. Heister, 37 N. Y. 661 90
Metropolitan R. Co. v. MacFarland, 20 App. D. C. 421 149, 155, 160
Metropolitan Rubber Co. v. Place, 147 Fed. 90 145
Meulenbergh v. Coe, 160 N. Y. S. 581 91
Meyer v. Nebraska, 262 U. S. 390 130, 132
v. Richmond, 172 U. S. 82 112
Meyer, Ex parte, 84 Tex. Cr. 288 120
Meyers v. Shields, 61 Fed. 713 88, 89
Miami County v. Dayton, 92 Ohio St. 215 174
Michaelson v. United States, 291 Fed. 940 87
v. Wall Tp., 92 N. J. L. 72 120
Michener v. Philadelphia, 118 Pa. St. 535 169
Michigan Cent. R. Co. v. Farrell, 52 Ind. App. 603 159
v. Miller, 172 Mich. 201 180
v. Powers, 201 U. S. 245 89, 142
v. State, 148 Mich. 151 157
Michigan Sugar Co. v. Auditor General, 124 Mich. 674 191
Michigan Trust Co. v. Ferry, 228 U. S. 346 90
Middleton v. Mullica, 112 U. S. 433 200
v. St. Augustine, 42 Fla. 287 204
v. Texas Power & L. Co., 108 Tex. 96 96
v. Texas Power & L. Co., 249 U. S. 152 96, 199, 224
Midland Valley R. Co. v. State, 29 Okla. 777 149
Mid-Northern Oil Co. v. Walker, 65 Mont. 414 142

[*References are to Sections.*]

Milan & R. Plk. Road Co. v. Husted, 3 Ohio St. 578 144
Milheim v. Moffat Tunnel Imp. Dist., 262 U. S. 710 170, 186
Military Training Camp, In re, 260 Fed. 986 201
Mill Creek Coal &c. Co. v. Public Serv. Commn., 84 W. Va. 662 90
Miller v. Cass County, 39 S. W. (Tex.) 966 89
v. Colonial Forestry Co., 73 Conn. 500 88,89
v. Commonwealth, 127 Ky. 387 104
v. Corinna, 42 Minn. 391 112
v. Dunn, 72 Cal. 462 198
v. Hageman, 114 Iowa 195 144
v. Horton, 152 Mass. 540 90
v. Jensen, 102 Minn. 391 173
v. Kramer, 148 Iowa 460 171
v. Lord Proprietary, 1 H. & McH. (Md.) 543 39
v. Miller, 91 N. Y. 315 102
v. New York &c. R. Co., 21 Barb. (N. Y.) 513 149, 161
v. O'Brien, 75 Colo. 117 87
v. Pulaski, 109 Va. 137 176, 204
v. Sacramento &c. Drainage Dist., 256 U. S. 129 170, 173
v. Southern Indiana Power Co., 184 Ind. 370 193
v. State, 8 Gill (Md.) 145 104
v. State, 15 Wall. (U. S.) 478 140, 154
v. United States, 11 Wall. (U. S.) 268 88
v. Valparaiso, 10 Ind. App. 22 128
v. Wilson, 236 U. S. 373 226
Miller, In re, 173 N. Y. S. 520 89
Miller's Case, 1 W. Blackstone 451 21
Millers' Mut. Fire Ins. Co. v. Austin, 210 S. W. (Tex. Civ. App.) 825 89
Miller Tel. Co. v. Minimum Wage Commn., 145 Minn. 262 131
Millett v. People, 117 Ill. 294 106, 127
Milligan v. Brooklyn Warehouse &c. Co., 34 Misc. (N. Y.) 55 110
Milligan, Ex parte, 4 Wall. (U. S.) 2 87, 128, 132
Millikan v. Crail, 177 Ind. 426 89
Mills v. Central R. Co., 41 N. J. Eq. 1 139
Millspaugh v. Cassedy, 191 App. Div. (N. Y.) 221 140
Milwaukee v. Chicago M. &c. R. Co., 168 Wis. 534 149
Milwaukee Elec. R. & L. Co. v. Milwaukee, 87 Fed. 577 90
v. Railroad Commn., 238 U. S. 174 148
v. Wisconsin, 252 U. S. 100 91
Milwaukee Elec. R. & L. Co., In re (Wis.), 203 N. W. 912 180
Minden v. Silverstein, 36 La. Ann. 912 120
Minneapolis v. Janney, 86 Minn. 111 179, 190, 195
v. Minneapolis St. R. Co., 115 Minn. 514 149
v. Minneapolis St. R. Co., 215 U. S. 417 163
Minneapolis &c. R. Co. v. Beckwith, 129 U. S. 26 127, 159
v. Emmons, 149 U. S. 364 159
v. Herrick, 127 U. S. 210 96
Minneapolis &c. R. Co., In re, 76 Minn. 302 180
Minneapolis St. Co. v. Minneapolis, 189 Fed. 445 160
Minneapolis, St. P. &c. R. Co. v. Manasha Wooden Ware Co., 159 Wis. 130 148
Minneapolis Thresh. Mach. Co. v. Ashauer, 142 Wis. 646 151
Minnesota v. Barber, 136 U. S. 313 226
Minnesota Canal & P. Co. v. Koochiching Co., 97 Minn. 429 192, 193
v. Pratt, 101 Minn. 197 176, 193
Minnesota, D. &c. R. Co. v. Way, 34 S. Dak. 435 149
Minnesota Iron Co. v. Kline, 199 U. S. 593 96
Minnesota Rate Cases, 230 U. S. 352 90, 229
Minnesota Sugar Co. v. Iverson, 91 Minn. 30 191
Minnotto v. Bradley, 252 Fed. 600 128
Minor v. Happersett, 21 Wall. (U. S.) 162 86, 124
Minot v. Philadelphia, W. &c. R. Co., 18 Wall. (U. S.) 206 142
Minyard v. Pelucia Drainage Dist., 133 Miss. 847 89
Miocene Ditch Co. v. Jacobson, 146 Fed. 680 177
Mirich v. Forschner Contr. Co., 312 Ill. 343 87
Mississippi Railroad Commn. v. Mobile & O. R. Co., 244 U. S. 388 149
Missouri v. Chicago, B. &c. R. Co., 241 U. S. 533 212
v. Lewis, 101 U. S. 22 86, 91, 108
v. Public Service Commn., 262 U. S. 276 90
Missouri &c. R. Co. v. State, 92 Ark. 1 159
Missouri Drug Co. v. Wyman, 129 Fed. 623 88
Missouri, K. &c. R. Co. v. Cambern, 66 Kans. 365 175
v. May, 194 U. S. 267 222
v. Shannon, 100 Tex. 379 142
v. State, 38 Okla. 401 149
v. Wetz, 97 Tex. 581 159
v. Witcher, 25 Okla. 586 149
Missouri, O. & R. Co. v. Brown, 46 Okla. 735 159
v. State, 28 Okla. 115 149
v. State, 29 Okla. 640 149
Missouri Pac. R. Co. v. Cass County, 76 Nebr. 396 149

[*References are to Sections.*]

Missouri Pac. R. Co. v. Castle, 224 U. S. 541 96
v. Humes, 115 U. S. 512 86, 122, 123, 124, 159
v. Kansas, 216 U. S. 262 149
v. Mackey, 33 Kans. 298 96
v. Mackey, 127 U. S. 205 96, 108
v. Nebraska, 164 U. S. 403 112, 126, 170, 179, 180, 194
v. Nebraska, 217 U. S. 196 90, 141
v. Omaha, 235 U. S. 121 149
v. Tucker, 230 U. S. 340 90
v. Western Crawford Rd. Imp. Dist., 266 U. S. 187 170

Missouri River, Ft. S. &c. R. Co. v. Duckett, 20 Kans. 623 159
Mitchell v. Burlington, 4 Wall. (U. S.) 270 181
v. Harmony, 13 How. (U. S.) 115 128
v. Negaunee, 113 Mich. 359 204, 205
v. Southern N. Eng. T. Co., 90 Conn. 179 180
v. State, 134 Ala. 392 203

Mix v. Board of County Commrs., 18 Idaho 695 120
Mixon v. Savannah & A. R., 28 Ga. App. 390 149
Mobile &c. R. Co. v. Jobe, 122 Miss. 696 91
v. Moseley, 52 Miss. 127 144
v. Postal Tel. C. Co., 120 Ala. 21 180
v. Postal Tel. C. Co., 101 Tenn. 62 180

Mobile Gas Co. v. Patterson, 290 Fed. 476 148
Mobile, J. &c. R. Co. v. Turnipseed, 219 U. S. 35 96
Mobile Temp. Hall Assn. v. Holmes, 189 Ala. 271 145, 146
Moch v. Virginia Fire & M. Ins. Co., 10 Fed. 696 151
Model Heating Co. v. Magarity, 2 Boyce (Del.) 459 151
Modern Loan Co. v. San Francisco Police Ct., 12 Cal. App. 582 110
Moffitt v. Pueblo, 55 Colo. 112 107
Molinari v. Maryland, 263 U. S. 685 120
Monetaire Min. Co. v. Columbus Rexal Consol. M. Co., 53 Utah 413 180
Monongahela Nav. Co. v. United States, 148 U. S. 312 157
Monongahela Water Co., In re, 223 Pa. 323 157
Montgomery v. Royal Exch. Assurance Corp., 5 Ala. App. 318 142
v. State, 53 Fla. 115 104
Montgomery Bank & T. Co. v. Walker, 181 Ala. 368 88, 151
Moore v. Danville, 232 Ill. 307 120
v. Dempsey, 261 U. S. 86 219

Moore v. Heany, 34 App. D. C. 31 88
v. Indian Spring Ch. Gold Min. Co., 37 Cal. App. 370 152
v. Owen, 58 Misc. (N. Y.) 332 116
v. Roxford Knitting Co., 250 Fed. 278 130
v. Sanford, 151 Mass. 285 203
Moorhead v. Murphy, 94 Minn. 123 198
Moredock v. Kirby, 118 Fed. 180 151
Morford v. Unger, 8 Iowa 82 171
Morgan v. Perry, 51 N. H. 559 102
v. State, 64 Nebr. 369 118
Morgan Bros. v. Dayton Coal & I. Co., 134 Tenn. 228 151
Morgan Steamship Co. v. Louisiana Bd. of Health, 118 U. S. 455 142
Morgan's L. & T. &c. Co. v. Railroad Commn., 109 La. 247 149
Morley v. Pragnel, 3 Croke (K. B.) 510 113
Morrell v. Colonial Security Co., 101 Tex. 309 151
v. Lalonde, 44 R. I. 20 88
Morrell Refrig. Car Co. v. Commonwealth, 128 Ky. 447 108
Morris v. American Pub. Utils. Co., 122 Atl. (Del. Ch.) 696 140
v. Columbus, 102 Ga. 792 128, 218, 225
v. Indianapolis, 177 Ind. 369 149
v. Jones, 150 Ill. 542 89
Morrison v. Indianapolis &c. R. Co., 166 Ind. 511 89
v. Morey, 146 Mo. 543 175
v. State, 116 Tenn. 534 114
v. Thistle Coal Co., 119 Iowa 705 180
Morton v. Robinson, 256 Ill. 629 87
Mosel v. San Antonio &c. R. Co. (Tex. Civ. App.), 249 S. W. 893 149
Moskowitz v. Brooklyn Heights R. Co., 47 Misc. (N. Y.) 119 160
Motlow v. State, 125 Tenn. 547 114, 120
v. State, 239 U. S. 653 120
Mott v. Southern R. Co., 131 N. Car. 234 96
Moulton v. Parks, 64 Cal. 166 167, 175
Moultrie v. Fairfield, 105 U. S. 370 186
Mound City Land &c. Co. v. Miller, 170 Mo. 240 175
Mountain Retreat Assn. v. Mt. Mitchell Dev. Co., 183 N. Car. 43 180
Mountain Timber Co. v. Washington, 243 U. S. 219 88, 91, 96, 159, 199
Mt. Pleasant v. Clutch, 6 Iowa 546 103
Mt. Pleasant Borough v. Baltimore &c. R. Co., 138 Pa. St. 365 168, 172

[*References are to Sections.*]

Mt. Pleasant Cem. Co. v. Newark, 52 N. J. L. 539 144
Mt. St. Mary's Cem. Assn. v. Mullins, 248 U. S. 501 172, 224
v. Mullins, 248 U. S. 501 170
Mt. Sinai Hospital v. Hyman, 92 App. Div. (N. Y.) 270 195
Mount Vernon v. Berman, 100 Ohio St. 1 149
Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U. S. 30 180, 193
Mowrey v. Indianapolis &c. R. Co., Fed. Cas. No. 9891 139
Moy Quong Shing, In re, 125 Fed. 641 91
Mueller v. Supervisors of Courtland, 117 Minn. 290 171
Mugler v. Kansas, 123 U. S. 623 120, 123, 125, 126, 213
Muller v. Oregon, 208 U. S. 412 131, 216, 226, 229, 232, 235
Mund v. Rehaume, 51 Colo. 129 102
Mundy v. Fountain, 76 N. J. L. 701 176
Municipal Officers v. Maine Cent. R. Co., 123 Maine 383 149
Munn v. Board of Supervisors, 161 Iowa 26 174
v. Illinois, 94 U. S. 113 86, 90, 109, 114, 115, 122, 123, 124, 208
v. Independent School Dist., 188 Iowa 757 112
Munro v. State, 223 N. Y. 208 198, 199
Murdock v. Cincinnati, 39 Fed. 891 88
Murphy v. California, 225 U. S. 623 118, 123, 217, 227
v. People, 2 Cow. (N. Y.) 815 8
Murray v. Alston, 1 Mill. Const. (S. Car.) 128 89
v. Board of County Commrs., 81 Minn. 359 195
v. Hoboken Land & Imp. Co., 18 How. (U. S.) 272 2, 79, 85, 94
Murray's Admr. v. Alston, 1 Mill Const. (S. Car.) 128 87
Muskrat v. United States, 219 U. S. 346 190
Mutual Life Ins. Co. v. Mullen, 107 Md. 457 142
Mutual Loan Co. v. Martell, 200 Mass. 482 114
v. Martell, 222 U. S. 225 217
Mutual Res. Fund Life Assn. v. Augusta, 109 Ga. 73 143
Myers v. Park, 55 Tenn. 550 91
Myles Salt Co. v. Iberia &c. Drainage Dist., 239 U. S. 478 170, 173

N

Nagle v. Augusta, 5 Ga. 546 103
Nakdimen v. Ft. Smith &c. Bridge Dist., 115 Ark. 194 186
Nance v. O. K. Houck Piano Co., 128 Tenn. 1 96
Napa Valley R. Co. v. Napa County, 30 Cal. 435 185
Napier v. Delaware, L. &c. R. Co., 91 N. J. L. 282 148
Nappi v. Grand Trunk R. Co., 78 N. H. 261 159
Nash v. Lathrop, 142 Mass. 29 122
v. United States, 229 U. S. 373 132
Nashville v. Linck, 80 Tenn. 499 120
Nashville, C. &c. R. Co. v. Alabama, 128 U. S. 96 142
v. Karthaus, 150 Ala. 633 180
Nasmith, In re, 2 Ont. (1883) 192 115
National Cotton Oil Co. v. Texas, 197 U. S. 115 91
v. State Council, 203 U. S. 151 110, 157
National Fertilizer Co. v. Lambert, 48 Fed. 458 122
National Mercantile Co. v. Mattson, 45 Utah 155 142
National Shutter Bar Co. v. Zimmerman, 110 Md. 313 142
National Union Fire Ins. Co. v. Wanberg, 260 U. S. 71 142
Naylor v. Harrisonville, 207 Mo. 311 89
Neal v. Delaware, 103 U. S. 370 104
Neely v. State, 72 Tenn. 316 104
Neer v. Sanitary Board, 40 N. Dak. 340 89, 123
Nega v. Chicago Rs. Co., 317 Ill. 482 91
Neitzel v. Spokane International R. Co., 65 Wash. 100 190
v. Spokane Internatl. R. Co., 80 Wash. 30 112
Nelson v. Fleming, 56 Ind. 310 180
v. Milford, 7 Pick. (Mass.) 18 198
v. State, 84 Fla. 631 89
v. State Bd. of Health, 186 Mass. 330 90
Nelson Lumber Co. v. McKinnon, 61 Minn. 238 89
Newark v. Central R. Co., 73 N. J. Eq. 469 149
v. Delaware, L. &c. R. Co., 42 N. J. Eq. 196 149
v. Erie R. Co., 76 N. J. Eq. 317 149
Newark Library Assn., In re, 64 N. J. L. 217 140, 146, 155
Newburyport Water Co. v. Newburyport, 103 Fed. 584 112
v. Newburyport, 193 U. S. 575 204
New Castle v. Cummings, 36 Pa. Super. Ct. 443 116
Newcomb v. Norfolk W. St. R. Co., 179 Mass. 449 160
Newell, In re, 2 Cal. App. 767 123
Newhall v. Western Zinc Min. Co., 164 Cal. 380 145
New Jersey v. New Jersey City, 199 Fed. 237 88

[*References are to Sections.*]

v. Wilson, 7 Cranch. (U. S.) 164 142, 144
New Jersey Cent. Trac. Co. v. Public Util. Commrs., 96 N. J. L. 90 90
Newland v. Marsh, 19 Ill. 376 88, 95
New London v. Brainard, 22 Conn. 552 195
Newman, Ex parte, 9 Cal. 502 116, 214
New Orleans v. Cannon, 10 La. Ann. 764 89
v. Clark, 95 U. S. 644 198, 199, 204
v. Le Blanc, 139 La. 113 123
v. McDonough, 2 Rob. La. 244 202
v. Smythe, 116 La. 685 120
New Orleans Gas Light Co. v. Louisiana L. & H. Co., 115 U. S. 650 114
New Orleans, M. &c. R. Co. v. State, 110 Miss. 290 142
Newport v. Commonwealth, 106 Ky. 434 144
v. Louisville &c. R. Co., 174 Ky. 799 149
Newton v. Consolidated Gas Co., 258 U. S. 165 212, 216
v. Superior, 146 Wis. 308 89
Newton Ave., Matter of, 173 App. Div. (N. Y.) 32 89
New Union Tel. Co. v. Marsh, 96 App. Div. (N. Y.) 122 180
New York v. Furgueson, 23 Hun (N. Y.) 594 114
v. Hesterberg, 211 U. S. 31 115, 227, 228
v. McCall, 245 U. S. 345 228
v. Mealy, 254 U. S. 47 144
v. Miln, 7 Pet. (U. S.) 102 113
v. Roberts, 171 U. S. 658 191
v. United States, 257 U. S. 591 90
v. Van de Can, 199 U. S. 552 219
New York, In re, 89 N. Y. S. 552 89
New York, In re, 167 N. Y. 624 171
New York &c. R. Co. v. Bloomfield Tp., 59 N. J. L. 109 149
v. Bristol, 151 U. S. 556 123, 149, 161
v. Waterbury, 60 Conn. 1 149
New York & Pennsylvania Co. v. New York Cent. R. Co., 267 Pa. St. 64 90
New York, C. &c. R. Co. v. Rhodes, 171 Ind. 521 149
New York Cent. &c. R. Co. v. Bianc, 250 U. S. 596 199
v. Metropolitan Gas-Light Co., 5 Hun (N. Y.) 201 192
v. Price, 159 Fed. 330 159
v. White, 243 U. S. 188 89, 96, 109, 199
v. Williams, 199 N. Y. 108 152
New York City v. Alhambra Theatre Co., 202 N. Y. 528 116
v. Harlem Bridge &c. R. Co., 186 N. Y. 304 149
New York City v. Kelsey, 213 N. Y. 638 115
v. Lord, 17 Wend. (N. Y.) 285 128
v. Ryan, 2 E. D. Smith (N. Y.) 368 114
v. Stone, 20 Wend. (N. Y.) 139 128
New York Life Ins. Co. v. Bradley, 83 S. Car. 418 142
v. Cravens, 178 U. S. 389 142, 147
v. Deer Lodge County, 231 U. S. 495 142
New York Mfg. Co. v. Secretary of State, 150 Mich. 197 142
New York Min. Co. v. Midland Min. Co., 99 Md. 506 180
New York, N. H. &c. R. Co. v. New York, 165 U. S. 628 217
v. Offield, 77 Conn. 417 180
New York, P. & N. Tel. Co. v. Dolan, 265 U. S. 96 142
Niagara Falls &c. R. Co., In re, 108 N. Y. 375 180
Niagara Lockport & O. P. Co., In re, 111 App. Div. (N. Y.) 686 193
Nichol v. Nashville, 28 Tenn. 252 181, 185
Nichols v. State, 8 Okla. Cr. 550 120
Nickey v. Stearns Ranchos Co., 126 Cal. 150 173
Nightingale, Ex parte, 12 Fla. 272 91, 124
Niles v. Benton Harbor-St. Joe R. & L. Co., 154 Mich. 378 149
Nishimura Ekiu v. United States, 142 U. S. 651 91
Ng Fung Ho v. White, 259 U. S. 276 91
Ng Loy Hoe, In re, 53 Fed. 914 91
Noble v. Mitchell, 100 Ala. 519 142
Noble State Bank v. Haskell, 219 U. S. 104 159, 211, 235
Noel v. Ewing, 9 Ind. 37 104
Nolan v. Central Georgia Power Co., 134 Ga. 201 193
v. Jones, 263 Pa. 124 114, 123
Nolen v. Riechman, 225 Fed. 812 224
Norfleet v. Cromwell, 70 N. Car. 634 173
Norfolk & P. Trac. Co. v. Norfolk, 115 Va. 169 149
Norfolk &c. R. Co. v. Bristol, 116 Va. 955 149
Norfolk &c. R. Co. v. Public Serv. Commn., 265 U. S. 70 149, 159
Norfolk County Commrs. v. Cox, 98 Va. 270 195
Norfolk R. Co. v. Commonwealth, 93 Va. 749 116
Norman v. Heist, 5 Watts & S. (Pa.) 171 102
v. Kentucky Bd. of Mgrs., 93 Ky. 537 195
Norris v. Clymer, 2 Pa. 277 102
v. Doniphan, 61 Ky. 385 88
Norris Safe & L. Co. v. Weaver, 81 Ore. 670 151

[*References are to Sections.*]

North American Cold Storage Co. v. Chicago, 151 Fed. 120 123
v. Chicago, 211 U. S. 306 90, 128
North Carolina Corp. Commn. v. Seaboard Air Line R. Co., 92 S. E. (N. Car.) 150 145
North Dakota v. Hanson, 215 U. S. 515 120
North Dakota State H. Commn. v. Great Northern R. Co. (N. Dak.), 200 N. W. 796 149
Northern Bank of Ky. v. Stone, 88 Fed. 413 144, 155
Northern Cedar Co. v. French, 131 Wash. 394 88, 91
Northern Central R. Co. v. Maryland, 187 U. S. 258 144
Northern Illinois L. & Trac. Co. v. Commerce Commn., 302 Ill. 11 90
Northern Liberty Hose Co., In re, 13 Pa. St. 193 89
Northern Pac. R. Co. v. Carland, 5 Mont. 146 141
v. Kreszeszewski, 17 N. Dak. 203 180
v. Minnesota, 208 U. S. 583 149
v. North Dakota, 236 U. S. 585 229
v. Puget Sound &c. R. Co., 250 U. S. 332 149
v. Richland County, 28 N. Dak. 172 174
Northern Trust Co. v. Sanford, 308 Ill. 381 88
North German Lloyd S. S. Co. v. Hedden, 43 Fed. 17 91
North Laramie Land Co. v. Hoffman, 268 U. S. 276 87, 88, 89
Northrup, Ex parte, 41 Ore. 489 116
North St. Louis Gym. Soc. v. Hagerman, 232 Mo. 693 144
North Springs Water Co. v. Tacoma, 21 Wash. 517 204
Northwest Auto Co. v. Hurlburt, 104 Ore. 398 89
Northwestern Mas. Aid Assn. v. Waddell, 138 Mo. 628 142
Northwestern Mut. Life Ins. Co. v. State, 163 Wis. 484 108, 142
v. Wisconsin, 247 U. S. 132 108
Northwestern Nat. Life Ins. Co. v. Riggs, 203 U. S. 243 90, 110, 142, 147
North Western R. Co., In re, 20 Int. Rev. Rec. 18 146, 156
Northwestern Tel. E. Co. v. Chicago, M. &c. R. Co., 76 Minn. 334 180
Northwestern University v. People, 99 U. S. 309 144
Norton v. McLeary, 8 Ohio St. 205 87
Norton, Ex parte, 44 Ala. 177 104
Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19 103, 122
Norwich Water Commrs. v. Palmer, 86 Conn. 151 10
Norwood v. Baker, 172 U. S. 269 170
Nutting v. Commrs. of Mass., 183 U. S. 553 90
N. Ward Co. v. Board of St. Commrs., 217 Mass. 381 204

O

Obenchain v. Ransome-Crummey Co., 69 Ore. 547 91
O'Brien v. Flint, 74 Conn. 502 110
v. Shea, 208 Mass. 528 116
v. Southern Bell T. & T. Co., 292 Fed. 379 142
Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320 91
Ochoa v. Morales, 230 U. S. 139 96
Ochs Brick & T. Co. v. Chicago &c. R. Co., 135 Minn. 323 180
Odd Fellows' Cem. Assn. v. San Francisco, 140 Cal. 226 123
Odin Coal Co. v. Denman, 185 Ill. 413 96
O'Donnell v. Bailey, 24 Miss. 386 144
Odum v. Garner, 86 Tex. 374 94
Oelbermann v. Merritt, 123 U. S. 356 89
Oelrich v. Pittsburg, 5 Pa. L. J. 485 185
Officer v. Young, 13 Tenn. 320 82, 93, 102
Offield v. New York, N. H. &c. R. Co., 203 U. S. 372 112, 231
Ohio v. Neff, 52 Ohio St. 375 139, 154
Ohio & M. R. Co. v. Lackey, 78 Ill. 55 124
v. Reed, 40 Ill. App. 47 149
Ohio Oil Co. v. Indiana, 177 U. S. 190 112, 127, 177, 226
Ohio Tax Cases, 232 U. S. 372 142
Ohio Tpk. Co. v. Waechter, 25 Ohio Cir. Ct. 605 90, 110
Ohio Util. Co. v. Public Util. Commn., 267 U. S. 359 217, 229
Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287, 90, 91, 229
Oklahoma City v. Shields, 22 Okla. 265 149
Oklahoma Gin Co. v. State (Okla.), 158 Pac. 629 91
Oklahoma Nat. Gas Co. v. State, 78 Okla. 5 91
Oklahoma Operating Co. v. Love, 252 U. S. 331 91
Oklahoma R. Co. v. Powell, 33 Okla. 737 160
Olcott v. Supervisors, 16 Wall. (U. S.) 678 183, 184, 185, 186
Old Dominion Land Co. v. United States, 296 Fed. 20 201
Oldknow v. Atlanta, 9 Ga. App. 594 114, 214
Oldtown & L. R. Co. v. Veazie, 39 Maine 571 139, 142
Old Wayne Mut. Life Assn. v. McDonough, 204 U. S. 8 151

[*References are to Sections.*]

Olender v. Crystaline Min. Co., 149 Cal. 482 151
Oler v. Pittsburgh, C. C. &c. R. Co., 184 Ind. 431 112
Oleson v. Green Bay &c. R. Co., 36 Wis. 383 186
Oliver v. Brennan, 292 Fed. 197 145
v. Memphis &c. R. Co., 30 Ark. 128 144
v. Washington Mills, 11 Allen (Mass.) 268 107
Oliver Co. v. Louisville Realty Co., 156 Ky. 628 151
Oliver Lee & Co.'s Bank, In re, 21 N. Y. 9 147, 151
Omaechevarria v. Idaho, 246 U. S. 343 107, 229
Omaha, L. &c. R. Co. v. Lincoln, 97 Nebr. 122 149
Omaha Water Co. v. Omaha, 147 Fed. 1 144, 148, 155
O'Neal v. Harrison, 96 Kans. 339 122
O'Neil v. Demers, 44 R. I. 504 120
v. Northern Colorado Irr. Co., 242 U. S. 20 91
v. Providence Amus. Co., 42 R. I. 479 114
v. Vermont, 144 U. S. 323 7
O'Neill v. Leamer, 239 U. S. 244 170, 231
Ontario Land Co. v. Yordy, 212 U. S. 152 88, 89
Opelika v. Daniel, 59 Ala. 211 185
v. Opelika Sewer Co., 265 U. S. 215 148
Opening of Oneida St., Matter of, 37 App. Div. (N. Y.) 266 89
Opinion of the Court, 58 N. H. 623 191
Opinion of the Judges, 43 S. Dak. 648 208
Opinion of the Judges, In re, 38 S. Dak. 635 203
Opinion of the Judges, In re, 43 S. Dak. 635 204
Opinion of the Justices, 58 Maine 590 206
Opinion of the Justices, 103 Maine 506 123
Opinion of the Justices, 150 Mass. 592 204, 205
Opinion of the Justices, 155 Mass. 598 206
Opinion of the Justices, 163 Mass. 589 152
Opinion of the Justices, 175 Mass. 599 199
Opinion of the Justices, 182 Mass. 605 206
Opinion of the Justices, 186 Mass. 603 200
Opinion of the Justices, 204 Mass. 607 203
Opinion of the Justices, 211 Mass. 608 200
Opinion of the Justices, 211 Mass. 624 203
Opinion of the Justices, 232 Mass. 601 96
Opinion of the Justices, 25 N. H. 537 88
Opinion of the Justices, 66 N. H. 629 154
Opinion of the Justices, In re, 16 Maine 479 104
Opinion of the Justices, In re 58 Maine 590 179, 188
Opinion of the Justices, In re, 118 Maine 503 190, 192
Opinion of the Justices, In re, 163 Mass. 589 152
Opinion of the Justices, In re, 204 Mass. 607 203
Opinion of the Justices, In re, 209 Mass. 607 96, 226
Opinion of the Justices, In re, 211 Mass. 605 114
Opinion of the Justices, In re, 211 Mass. 618 110
Opinion of the Justices, In re, 211 Mass. 624 203
Opinion of the Justices, In re, 232 Mass. 601 96, 97
Opinion of the Justices, In re, 234 Mass. 597 226
Opinion of the Justices, In re, 237 Mass. 598 193
Opinion of the Justices, In re, 251 Mass. 569 160
Opinion of the Justices, In re, 25 N. H. 537 115, 118
Orange County v. Harris, 97 Cal. 600 91
v. Storm King Stone Co., 191 App. Div. (N. Y.) 329 89
Orange County T. Co. v. Newburgh, 149 N. Y. S. 1 149
Ordinance of St. Albans, Case of the, 2 Dwarris Statutes 807 26
Oregonian R. Co. v. Oregon & N. Car. Co., 27 Fed. 277 142
Oregon Lumber Co. v. East Fork Irr. Dist., 80 Ore. 568 90
Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578 89
O'Reilly v. Brooklyn Heights R. Co., 179 N. Y. 450 160
Orena v. Sherman, 61 Cal. 101 89
Orient Ins. Co. v. Daggs, 172 U. S. 557 142, 147, 155
Origet v. Hedden, 155 U. S. 228 89
Orme v. Salt River Valley Water Users' Assn., 25 Ariz. 324 139
Ormsby Land Co. v. Pittsburgh, 276 Pa. 68 190
Orr v. Allen, 245 Fed. 486 89, 173
Osborne v. Adams County, 109 U. S. 1 190
v. Huger, 1 Bay. (S. Car.) 179 80, 81, 82
v. Humphrey, 7 Conn. 335 144
Osburn v. Chicago, 105 Ill. App. 217 149
Osgood v. Conway, 67 N. H. 100 198
Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437 91
Oskamp v. Lewis, 103 Fed. 906 89
Oswego, D. & R. Co. v. Cobb, 66 Ore. 587 180

[*References are to Sections.*]

Otis v. Parker, 187 U. S. 606 127, 222, 227, 233
Otis Co. v. Ludlow Mfg. Co., 201 U. S. 140 112, 187
Otis Elev. Co. v. Chicago, 263 Ill. 419 149
Ottawa v. Carey, 108 U. S. 110 204
Our House No. 2 v. State, 4 G. Greene (Iowa) 172 120
Outagamic County v. Zuehlke, 165 Wis. 32 207
Owen v. Purdy, 12 Ohio St. 73 151
Owensboro v. Cumberland T. & T. Co., 230 U. S. 58 143, 155
Ownbey v. Morgan, 256 U. S. 94 96, 97
Owners of Big James Gray v. Ship John Fraser, 21 How. (U. S.) 187 114
Oxnard Beet Sugar Co. v. State, 73 Nebr. 57 191
Ozan Lumber Co. v. Biddie, 87 Ark. 587 152
v. Union County Nat. Bank, 207 U. S. 251 217
Ozark Coal Co. v. Pennsylvania &c. R. Co., 97 Ark. 495 180

P

Pacific Bridge Co. v. Kirkham, 54 Cal. 558 181
Pacific Coast Coal Co. v. District No. 10, 122 Wash. 423 91
Pacific Express Co. v. Seibert, 142 U. S. 339 142
Pacific Gas & E. Co. v. Devlin, 188 Cal. 33 112
v. Police Court, 251 U. S. 22 123
Pacific Live Stock Co. v. Lewis, 241 U. S. 440 91
Pacific R. Co. v. Maguire, 20 Wall. (U. S.) 36 111
Padelford v. Savannah, 14 Ga. 438 221
Paducah &c. R. Co. v. Commonwealth, 80 Ky. 147 149
Paducah St. R. Co. v. McCracken County, 105 Ky. 472 142
Page v. Mathews, 40 Ala. 547 94, 104
v. United States, 258 U. S. 627 120
Page, In re, 60 Kans. 842 113
Painter v. St. Clair, 98 Va. 85 112
Palliser v. Home Tel. Co., 152 Ala. 440 139
Palmberg v. Kinney, 65 Ore. 220 89
Palmer v. Hickory Grove Cem., 82 N. Y. S. 973 115
v. Larchmont Elec. Co., 158 N. Y. 231 171, 180
v. McMahon, 133 U. S. 660 89, 91, 94, 96
Pappens v. United States, 252 Fed. 55 128
Pardee v. Rayfield, 192 App. Div. (N. Y.) 5 144
Parfitt v. Ferguson, 3 App. Div. (N. Y.) 176 122
Parham v. Potts-Thompson Liquor Co., 127 Ga. 303 87
Paris v. Brenneman, 59 Tex. Civ. App. 464 110
Parish v. East Coast Cedar Co., 133 N. Car. 478 91
Park v. Pacific Fire E. Co., 37 Cal. App. 112 204
Park Ave. Sewers, 169 Pa. St. 433 172
Parke v. Mullett, 245 Mo. 168 151
Parker v. Commonwealth, 6 Pa. 507 115
v. Hamilton, 49 Okla. 693 87
v. Metropolitan R. Co., 109 Mass. 506 148
v. People, 111 Ill. 581 160
v. Wallace, 80 Misc. (N. Y.) 425 204
Parkersburg v. Brown, 106 U. S. 487 190
Park Hill Dev. Co. v. Evansville, 190 Ind. 432 115
Parrott v. Benson, 114 Wash. 117 114, 227, 228
Parrott, In re, 1 Fed. 481 107
Parsons v. Russell, 11 Mich. 113 88
v. Van Wyck, 56 App. Div. (N. Y.) 329 202
Passavant v. United States, 148 U. S. 214 91
Patchin v. Sands, 10 Wend. (N. Y.) 510 87
Patchogue St. Crossings, In re, 74 Hun (N. Y.) 46 119
Pate v. Bank of Newton, 116 Miss. 666 147
Paterson v. Kearny, 87 N. J. L. 327 176
Patsone v. Pennsylvania, 232 U. S. 138 107, 115
Patterson v. Colorado, 205 U. S. 454 91, 96
Pattison v. Yuba County, 13 Cal. 175 185
Patton v. Brady, 184 U. S. 608 108
v. United States, 288 Fed. 812 87
Patty v. Colgan, 97 Cal. 251 197
Paul v. Glouchester County, 50 N. J. L. 585 120
v. Virginia, 8 Wall. (U. S.) 168 124, 142, 147, 151
Paulsen v. Portland, 149 U. S. 30 88, 89, 169, 172
Pauly v. Keebler, 175 Wis. 428 88, 106
Pawhuska v. Pawhuska Oil & G. Co., 250 U. S. 394 148
Paxton's Case, Quincy (Mass.) 520 48
Peacock v. Limburger (Tex. Civ. App.), 67 S. W. 518 120
v. Pratt, 121 Fed. 772 108
Pearson v. Twohy Bros. Co. (Ore.), 231 Pac. 129 149
v. Yewdall, 95 U. S. 294 86, 88, 89
v. Zehr, 138 Ill. 48 88, 90
Peart v. Meeker, 45 La. Ann. 421 175
Peck v. Linney, 97 Wash. 103 90

[*References are to Sections.*]

Pecos &c. R. Co. v. Railroad Commn., 56 Tex. Civ. App. 422 149
Pedersen v. Moore, 32 Idaho 420 87
Peede, Ex parte, 75 Tex. Cr. 247 120
Peik v. Chicago &c. R. Co., 94 U. S. 164 90
Peirce v. Sowersworth, 10 N. H. 369 89
v. Van Dusen, 78 Fed. 693 96
Pekin v. Smelzel, 21 Ill. 464 120
Pekin Cooperage Co. v. Duty, 140 Ark. 135 151
Pembina Consol. S. Min. &c. Co. v. Pennsylvania, 125 U. S. 181 142
Pennell v. State, 141 Wis. 35 120, 235
Pennock v. Hoover, 5 Rawle (Pa.) 291 169
Pennoyer v. Neff, 95 U. S. 714 88, 96, 97
Penn's Case, 6 Howell State Trials (1670) 951 39
Pennsylvania Coal Co. v. Mahon, 260 U. S. 393 112, 129, 130, 131, 132, 235
Pennsylvania Co., In re, 27 Pa. Super. Ct. 113 149
Pennsylvania College Cases, 13 Wall. (U. S.) 190 139
Pennsylvania Fire Ins. Co. v. Gold Issue M. & M. Co., 243 U. S. 93 151
Pennsylvania Mut. Life Ins. Co. v. Philadelphia, 242 Pa. 47 202, 203
Pennsylvania R. Co. v. Board of Pub. Util. Commrs., 84 N. J. L. 764 160
v. Gebhardt, 90 N. J. L. 36 148
v. Herrmann, 89 N. J. L. 582 148, 160
Penshorn v. International &c. R. Co. (Tex. Civ. App.), 186 S. W. 868 159
People v. Adirondack R. Co., 160 N. Y. 225 112
v. Arnold Bros., 282 Ill. 305 89
v. Barbiere, 33 Cal. App. 770 90
v. Barltz, 212 Mich. 580 104
v. Bashford, 128 App. Div. (N. Y.) 351 120
v. Batchellor, 53 N. Y. 128 169, 182, 185, 186
v. Beakes Dairy Co., 222 N. Y. 416 149, 160, 217
v. Bellet, 99 Mich. 151 116
v. Bennett, 29 Mich. 451 171
v. Blanchard, 105 Misc. (N. Y.) 401 114, 120
v. Board of Education, 234 Ill. 422 128
v. Board of Education, 224 Mich. 388 128
v. Board of Health, 140 N. Y. 1 90
v. Board of State Auditors, 9 Mich. 327 191
v. Booth Fisheries Co., 253 Ill. 423 115
People v. Boston &c. R. Co., 70 N. Y. 569 149, 154, 161
v. Bowen, 30 Barb. (N. Y.) 24 122
v. Bowes-Allegretti Co., 244 Ill. 557 114
v. Boykin, 298 Ill. 11 96
v. Bradley, 207 N. Y. 592 149
v. Brazee, 183 Mich. 259 114
v. Brooklyn, 6 Barb. (N. Y.) 209 169
v. Brooklyn, 4 Comst. (N. Y. C. A.) 419 165, 166
v. Brooks, 224 Mich. 45 195
v. Budd, 117 N. Y. 1 90, 122
v. Burr, 13 Cal. 343 198, 199
v. Byrne, 99 Misc. (N. Y.) 1 114
v. Casa Co., 35 Cal. App. 194 123
v. Charles Schweinler Press, 214 N. Y. 395 212, 226, 227, 229, 234
v. Chicago, &c. R. Co., 118 Ill. 113 160
v. Chicago, M. &c. R. Co., 306 Ill. 486 106
v. C. Klinck Packing Co., 214 N. Y. 121 116
v. Coler, 166 N. Y. 1 127, 198
v. Commercial Life Ins. Co., 247 Ill. 92 142
v. Commissioners of Taxes, 47 N. Y. 501 144
v. Crissman, 41 Colo. 450 89
v. Damm, 183 Mich. 554 123
v. Day, 277 Ill. 543 89
v. Delaney, 130 N. Y. S. 833 90
v. Delaware & H. Canal Co., 165 N. Y. 362 149
v. Department of Health, 189 N. Y. 187 91
v. Derose (Mich.), 203 N. W. 95 116
v. Desmond, 186 N. Y. 232 172
v. Diamond, 199 App. Div. (N. Y.) 497 91
v. Dickerson, 164 Mich. 148 97, 98
v. Dunford, 207 N. Y. 17 116
v. Ekerold, 211 N. Y. 386 128
v. Elerding, 254 Ill. 579 114, 217, 224
v. Equitable Trust Co., 96 N. Y. 387 142
v. Feitner, 191 N. Y. 88 89
v. Finley, 153 Cal. 59 229
v. Fire Association, 92 N. Y. 311 142
v. Fisher, 98 Misc. (N. Y.) 131 112
v. Fitch, 154 N. Y. 14 195, 196
v. Flannelly, 128 Cal. 83 96
v. Forbes, 52 Hun (N. Y.) 30 118
v. Gallagher, 4 Mich. 244 82, 84, 115, 120
v. Gass, 190 N. Y. 323 144
v. Gillespie, 48 N. Y. S. 882 90
v. Gillson, 109 N. Y. 389 217
v. Glynn, 194 N. Y. 387 142
v. Goldfogle, 123 Misc. (N. Y.) 399 167

[*References are to Sections.*]

People v. Gordon, 274 Ill. 462 97, 106
v. Granite State P. Assn., 161 N. Y. 492 151
v. Grifenhagen, 154 N. Y. S. 965 87
v. Griffith, 280 Ill. 18 114
v. Grout, 79 App. Div. (N. Y.) 61 199
v. Grout, 87 App. Div. (N. Y.) 193 195
v. Grout, 44 Misc. (N. Y.) 526 198
v. Hagan, 36 Misc. (N. Y.) 349 116
v. Hall, 169 N. Y. 184 87
v. Havnor, 149 N. Y. 195 116
v. Hawley, 3 Mich. 330 115, 120
v. Holdbridge, 4 Lans. (N. Y.) 511 104
v. Holmes, 90 Misc. (N. Y.) 63 120
v. Humphrey, 23 Mich. 471 112
v. Illinois Cent. R. Co., 235 Ill. 374 141
v. International Bridge Co., 223 N. Y. 137 157
v. Jackson & M. P. Rd. Co., 9 Mich. 285 113
v. Jefferson County Court, 55 N. Y. 604 169
v. Jenkins, 1 Hill (N. Y.) 469 114
v. Johnson, 288 Ill. 442 114
v. Johnson, 200 Ill. App. 603 120
v. Jones, 280 Ill. 259 120
v. Joyce, 174 App. Div. (N. Y.) 574 116
v. Judge of Cir. Ct., 21 Mich. 577 142
v. Kaelber, 253 Ill. 552 120
v. Keebler, 175 Wis. 428 97
v. Kelly, 76 N. Y. 475 198
v. Kowalski, 307 Ill. 378 87
v. La Fetra, 230 N. Y. 429 90, 123, 129, 131, 132, 214, 227
v. Lawrence, 6 Hill. (N. Y.) 244 199
v. Lent, 215 N. Y. 626 116
v. Leubischer, 34 App. Div. (N. Y.) 577 87
v. Lloyd, 304 Ill. 23 97
v. McBride, 234 Ill. 146 120
v. McClellan, 124 App. Div. (N. Y.) 664 87
v. McIlwain, 151 N. Y. S. 366 128
v. Mackey, 255 Ill. 144 142
v. Marx, 99 N. Y. 377 124, 229
v. Max, 70 Colo. 100 88, 91, 106
v. Mayor of Brooklyn, 4 N. Y. 419 169
v. Merhige, 219 Mich. 95 104
v. Milk Producers' Assn., 60 Cal. App. 439 153
v. Mitchell, 45 Barb. (N. Y.) 208 185
v. Monterey Fish Prod. Co. (Cal.), 234 Pac. 398 115
v. Morris, 13 Wend. (N. Y.) 325 115
v. Morton, 148 N. Y. 156 91
People v. Moyihan, 200 N. Y. S. 434 88
v. Moynihan, 121 Misc. (N. Y.) 34 130
v. Murray, 149 N. Y. 367 213, 224, 227, 233, 235
v. Mystic W. of W., 270 Ill. 496 142
v. Naglee, 1 Cal. 232 103
v. National Box Co., 248 Ill. 141 89
v. Nellis, 249 Ill. 12 91
v. New York Soc. for Prevention of Cruelty to Chil., 161 N. Y. 233 195
v. O'Brien, 10 N. Y. 596 157
v. O'Brien, 111 N. Y. 1 146, 154
v. O'Brien, 52 N. Y. S. 519 146
v. Otis, 90 N. Y. 1882 110
v. Partridge, 172 N. Y. 305 199
v. Pendergast, 144 App. Div. (N. Y.) 308 198
v. Pitcher, 56 Colo. 343 89
v. Pitt, 169 N. Y. 521 88, 172
v. Priest, 206 N. Y. 274 112
v. Public Serv. Commn., 167 App. Div. (N. Y.) 279 160
v. Public Serv. Commn., 220 N. Y. 1 149
v. Public Serv. Commn., 226 N. Y. 527 139, 141
v. Public Serv. Commn., 125 N. Y. S. 1000 148
v. Public Serv. Commn., 138 N. Y. S. 434 148
v. Public Serv. Commn., 160 N. Y. S. 63 149
v. Purdy, 149 N. Y. S. 315 149
v. Raymond, 126 App. Div. (N. Y.) 720 144
v. Regents, 199 App. Div. (N. Y.) 55 139
v. Rice, 11 N. Y. S. 249 142
v. Ronner, 97 N. Y. S. 550 106
v. Raymond, 194 N. Y. 189 144
v. Roper, 35 N. Y. 629 144
v. Rosenberg, 67 Hun (N. Y.) 52 114
v. Sacramento Drainage Dist., 155 Cal. 373 224
v. St. Louis, 297 Ill. 199 89
v. Salem, 20 Mich. 452 183, 184, 191
v. Sandy, 70 Colo. 558 120
v. Sayer, 246 Ill. 382 115
v. Schaeffer, 310 Ill. 574 106
v. Schafran, 168 Mich. 324 120
v. Sheriff of Kings County, 13 Misc. (N. Y.) 587 116
v. Simonsen, 64 Cal. App. 97 142
v. Sisson, 180 App. Div. (N. Y.) 464 90
v. Sisson, 101 Misc. (N. Y.) 23 106, 120
v. Sisson, 102 Misc. (N. Y.) 186 128
v. Sisson, 167 N. Y. S. 134 123
v. Smith, 108 Mich. 527 211, 216, 225
v. Smith, 21 N. Y. 595 81, 88, 165

[*References are to Sections.*]

People v. Soldiers' Home, 95 Ill. 561 144
v. Squire, 145 U. S. 175 126, 142
v. State Bd. of Tax Commrs., 179 App. Div. (N. Y.) 489 141
v. State Treasurer, 23 Mich. 499 179, 184
v. Steele, 231 Ill. 340 114
v. Stilwell, 78 Misc. (N. Y.) 96 145
v. Strassheim, 242 Ill. 359 94, 97, 98
v. Supervisors, 16 Mich. 254 199
v. Supervisors, 26 Mich. 22 174
v. Supervisors, 4 Barb. (N. Y.) 64 81, 82
v. Tibbets, 4 Cowen (N. Y.) 384 95
v. Toynbee, 20 Barb. (N. Y.) 224 120
v. Turner, 1 Cal. 152 87
v. Urcavitch, 210 Mich. 431 120
v. Union Pac. R. Co., 20 Colo. 186 149
v. Vandecarr, 175 N. Y. 440 88
v. Velorde, 45 Cal. App. 520 120
v. Wagoner, 86 Mich. 594 115
v. Walbridge, 6 Cowen (N. Y.) 512 103
v. Walsh, 202 App. Div. (N. Y.) 651 143
v. Walton, 145 N. E. (Ill.) 182 115
v. Warren, 34 N. Y. S. 942 127
v. Weiner, 271 Ill. 74 114, 226, 229
v. Wells, 181 N. Y. 252 89
v. Wendell, 197 App. Div. (N. Y.) 131 144
v. Westchester County Nat. Bank, 231 N. Y. 465 201
v. Wheeler, 185 Mich. 164 120
v. Whitlock, 92 N. Y. 191 91
v. Willi, 109 Misc. (N. Y.) 79 120
v. Williams, 189 N. Y. 131 212, 232
v. Witte, 315 Ill. 282 114
People's Bldg. L. & S. Assn. v. Markley, 27 Ind. App. 128 142
People's Nat. Gas Co. v. Public Serv. Commrs., 123 Atl. (Pa.) 799 88
Peoria v. Kidder, 26 Ill. 351 168
Perdue v. State, 134 Ga. 300 110
Pere Marquette R. Co. v. United States Gypsum Co., 154 Mich. 290 180
Perkins v. Coffin, 84 Conn. 275 141
v. Cottrell, 15 Barb. (N. Y.) 446 80, 102
v. Lewis, 24 Ill. 208 185
v. Milford, 59 Maine 315 200
Perley v. North Carolina, 249 U. S. 510 90, 224
Perrin v. Oliver, 1 Minn. 202 156
v. United States, 232 U. S. 478 131, 212
Perry v. Keene, 56 N. H. 514 183, 184
Perry v. Newsom, 36 N. Car. 28 102
Persing v. Reno Stock Brok. Co., 30 Nev. 342 88, 94
Peters v. San Antonio (Tex. Civ. App.), 195 S. W. 989 142
v. State, 96 Tenn. 682 115
Peterson v. Chicago, R. I. &c. R. Co., 205 U. S. 364 151
v. New Pittsburg Coal & C. Co., 149 Ind. 260 149
Peterson, In re, 253 U. S. 300 97
Petit v. Minnesota, 177 U. S. 164 116, 127, 214, 217
Petition of Pittsburg, 217 Pa. 227 88
Pettine, Ex parte, 259 Fed. 733 91
Petty v. Myers, 49 Ind. 1 185, 186
Pfleger v. Groth, 103 Wis. 104 115
Philadelphia v. Contributors to Hospital, 134 Pa. 171 144
v. Empire Pass. R. Co., 3 Brewst. (Pa.) 570 149
v. Masonic Home, 160 Pa. St. 572 196
v. Miller, 49 Pa. 440 89
v. Philadelphia, W. &c. R. Co., 33 Pa. 41 169
v. Ridge Ave. Pass. R. Co., 143 Pa. 444 149
v. Scott, 81 Pa. 80 90, 124
Philadelphia Assn. v. Wood, 39 Pa. St. 73 195, 199
Philadelphia Fire Assn. v. New York, 119 U. S. 110 142
Philbrook v. Kennebec, 17 Maine 196 181
Phillips v. Albany, 28 Wis. 340 186
v. Postal Tel. & C. Co., 130 N. Car. 513 112
v. Postal Tel. & C. Co., 131 N. Car. 225 112
v. Watson, 63 Iowa 28 171
Phillips Academy v. Andover, 175 Mass. 118 172
Phoenix Assur. Co. v. Fire Dept., 117 Ala. 631 142, 195, 199
v. Ludwig, 87 Ark. 465 142
Phoenix Mut. Life Ins. Co. v. Lincoln, 91 Nebr. 150 149
Picquet, Appellant, 22 Mass. (5 Pick.) 65 104
Piedmont Cotton Mills v. Georgia R. & Elec. Co., 131 Ga. 129 180
Piel Bros v. Day, 278 Fed. 223 120
Pierce v. Carskadon, 16 Wall. (U. S.) 234 116
v. Drew, 136 Mass. 75 180
v. Huntsville, 185 Ala. 490 88
v. People, 106 Ill. 11 142
v. Society of Sisters, 268 U. S. 510 228
v. State, 13 N. H. 536 88, 115, 118
v. United States, 252 U. S. 239 146
Pierce County v. Thompson, 82 Wash. 440 173
Pierce Oil Co. v. Hope, 248 U. S. 498 217

[*References are to Sections.*]

Pierce Oil Corp. v. Weinert, 106 Tex. 435 142
Pinchback v. State, 15 Okla. Cr. 402 120
Pine v. Commonwealth, 121 Va. 812 120
Pine Grove v. Talcott, 19 Wall. (U. S.) 666 184, 185, 186
Pioneer Coal Co. v. Cherrytree &c. R. Co., 273 Pa. 43 180
Pioneer Irr. Dist. v. Bradley, 8 Idaho 310 177
Piper v. Big Pine School Dist., 193 Cal. 664 110
v. Ekern, 180 Wis. 586 202
Pippin v. Board of Commrs., 87 Okla. 177 89
Piqua v. Zimmerlin, 35 Ohio St. 507 120
Pirkey Bros. v. Commonwealth, 134 Va. 713 116
Pittman v. Byars, 51 Tex. Civ. App. 83 87
Pittsburg v. State, 180 Ind. 245 90
Pittsburg &c. R. Co. v. Butler, 242 Pa. 461 149
Pittsburg & W. Va. Gas Co. v. Cutright, 83 W. Va. 42 180
Pittsburg, C., C. &c. R. Co. v. Backus, 154 U. S. 421 89
v. Hodge, 175 Ind. 669 174
v. Montgomery, 152 Ind. 1 96
v. State, 180 Ind. 245 216, 226
Pittsburg Const. Co. v. West Side Belt R. Co., 151 Fed. 125 151
Pittsburg Hydro-Elec. Co. v. Liston, 70 W. Va. 83 180
Pittsburg Life & Tr. Co. v. Young, 172 N. Car. 470 142
Pitznogle v. Western Maryland R. Co., 119 Md. 673 171, 180
Pizer v. Hunt, 148 N. E. (Mass.) 801 88
Place v. Providence, 12 R. I. 1 203
Platt v. Poe, 69 Fed. 546 89
Pleasant v. Kost, 29 Ill. 490 169
Plecker v. Rhodes, 30 Grat. (Va.) 795 180
Plessy v. Ferguson, 163 U. S. 537 127, 233
Pleuler v. State, 11 Nebr. 547 126
Plumb v. Christie, 103 Ga. 686 203
Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531 91
Pocatello v. Murray, 21 Idaho 180 148
v. Murray, 226 U. S. 318 148
Pocopson Road, 16 Pa. 15 88, 102
Pohl v. Chicago, M. &c. R. Co., 52 Mont. 572 89
Poland Coal Co., In re, 58 Pa. Super. Ct. 312 171
Police Jury v. Succession of McDonogh, 8 La. Ann. 341 185
Polk v. Mutual R. F. L. Assn., 207 U. S. 310 139, 157
v. Railroad Commn., 154 Wis. 523 149
v. State (Okla. Cr.), 224 Pac. 194 87
Pomeroy v. Hocking Valley R. Co., 218 N. Y. 530 151
Pond Creek Coal Co. v. Lester, 171 Ky. 811 152
Ponder v. Graham, 4 Fla. 23 104
Pons v. Pons, 132 La. 370 87
Pontchartrain R. Co. v. Orleans Nav. Co., 15 La. 404 122
Pontius v. Bowman, 66 Iowa 88 120
v. Winebrenner, 65 Iowa 591 120
Pool v. Simmons, 134 Cal. 621 180
Porter, In re, 2 Rec. N. Car. 689 40
Porter v. Armstrong, 139 N. Car. 179 173
v. Hopkins, 91 Ohio St. 74 96
v. Illinois So. R. Co., 137 Mo. App. 293 159
v. International Bridge Co., 200 N. Y. 234 180
v. Mitchell, 4 Alaska 327 89
Portland v. Public Serv. Commn., 89 Ore. 325 148
v. Schmidt, 13 Ore. 17 120
Portland R. L. & P. Co. v. Portland, 181 Fed. 632 112
v. Portland, 210 Fed. 667 148
v. Railroad Commn., 229 U. S. 397 90
Portneuf Irr. Co. v. Budge, 16 Idaho 116 87, 177
Postal Telegraph-Cable Co. v. Newport, 247 U. S. 464 92
Pottlatch Lumber Co. v. Peterson, 12 Idaho 769 190
Poughkeepsie &c. Plk. Rd. Co. v. Griffin, 21 Barb. (N. Y.) 454 139
Pouliot, Ex parte, 196 Fed. 437 91
Powell v. Newburgh, 19 Johns. (N. Y.) 284 198
v. Pennsylvania, 127 U. S. 678 123, 126, 217, 221
v. Sammons, 31 Ala. 552 88
Power v. Nordstrom, 150 Minn. 228 116
Powers v. Inferior Court, 23 Ga. 65 185
v. Richmond, 122 Va. 328 89
Powers, In re, 25 Vt. 261 87
Power Vein Coal Co. v. Industrial Board, 255 U. S. 144 108
Poye v. State, 89 Tex. Cr. 182 131
Prager v. Armstrong County, 48 Pa. Super. Ct. 140 171
Prairie Pebble Phos. Co. v. Silverman, 80 Fla. 541 152
Pratt v. Brown, 3 Wis. 603 156
Pratt Institute v. New York City, 183 N. Y. 151 144
Prentis v. Atlantic Coast Line R. Co., 211 U. S. 210 90
Prescott Irr. Co. v. Flathers, 20 Wash. 454 177
Presser v. Illinois, 116 U. S. 252 86
Preston v. Chicago, 246 Ill. 26 91
Prettyman v. Tazewell County, 19 Ill. 406 185
Price v. Hopkins, 13 Mich. 318 80, 110
v. Illinois, 238 U. S. 446 227, 235
v. People, 193 Ill. 114 114

[*References are to Sections.*]

Price's Estate, In re, 119 Misc. (N. Y.) 19 87
Pricha, Ex parte, 70 Fla. 265 120
Prigg v. Pennsylvania, 16 Pet. (U. S.) 539 114
Prince v. Crocker, 166 Mass. 347 90, 183, 184, 186, 205
Pritchard v. Magoun, 109 Iowa 364 181
Probasco v. Moundsville, 11 W. Va. 501 144
Proctor v. State, 15 Okla. Cr. 338 120
Prohibitory Amendment Cases, 24 Kans. 700 120
Prospect Park &c. R. Co., In re, 85 N. Y. 489 91
Prout v. Berry, 2 Gill. (Md.) 147 104
Providence Bank v. Billings, 4 Pet. (U. S.) 514 142
Provident Inst. v. Mayor of Jersey City, 113 U. S. 506 86
Provident Sav. Life Assur. Soc. v. Cutting, 181 Mass. 261 91
Prudential Ins. Co. v. Cheek, 259 U. S. 530 152, 159, 235
Prynn's Case, 5 Mod. (1691) 459 29, 30, 96
Public Clearing House v. Coyne, 194 U. S. 497 88, 91, 110
Public Service Co. v. Recktenwald, 290 Ill. 314 180
Public Serv. Commn. v. New York R. Co., 77 Misc. (N. Y.) 487 160
v. New York Cent. R. Co., 258 U. S. 621 160
v. Pavilion Nat. Gas. Co., 232 N. Y. 146 148
Public Serv. Commn., Matter of, 164 N. Y. S. 310 149
Public Serv. R. Co. v. Board of Pub. Util. Commrs., 85 N. J. L. 123 160
v. Board of Pub. Util. Commrs., 276 Fed. 979 90
Puget Sound Trac.., L. & P. Co. v. Reynolds, 244 U. S. 574 160
Pullman Co. v. Adams, 189 U. S. 420 142
v. Kansas, 216 U. S. 56 145
v. Knott, 70 Fla. 9 106
v. Knott, 235 U. S. 23 88, 89
Pumpelly v. Green Bay & M. Co., 13 Wall. (U. S.) 166 122, 124
Purity Ext. & Tonic Co. v. Lynch, 226 U. S. 192 120, 217, 235
Purvis v. Ocilla, 149 Ga. 771 116, 118
Puster v. Parker Merc. Co., 70 N. J. Eq. 771 151

Q

Quackenbush v. Wisconsin &c. R. Co., 62 Wis. 411 96
Quan Hing Sun v. White, 254 Fed. 402 107
Quarles v. Sparta, 2 Tenn. Ch. App. 714 89
Quarrier, Ex parte, 4 W. Va. 220 116
Queen City Fire Ins. Co. v. Basford, 27 S. Dak. 164 142
Queensbury v. Culver, 19 Wall. (U. S.) 83 184, 185
Queens Land Co. v. Kings County Tr. Co., 255 Fed. 222 91
Quong Wo, Ex parte, 161 Cal. 220 213

R

Raabe v. State, 7 Ohio App. 119 91
Radice v. New York, 264 U. S. 292 108, 131, 217, 227, 228
Radivoeff, Ex parte, 278 Fed. 227 88
Rahrer, In re, 140 U. S. 545 123
Rail & River Coal Co. v. Yaple, 236 U. S. 338 152
Railroad Co. v. Husen, 95 U. S. 465 128
v. Johnson, 108 Ill. 11 89
v. Maine, 96 U. S. 499 144
v. Richmond, 96 U. S. 521 86
Railroad Commn. v. Alabama Gt. S. R. Co., 185 Ala. 354 149
v. Alabama Northern R. Co., 182 Ala. 357 149
v. Chicago, R. I. &c. R. Co., 102 Tex. 393 149
v. St. Louis &c. R. Co., 195 Ala. 527 149
v. Saline River R. Co., 119 Ark. 239 149
v. Southern Pac. Co., 264 U. S. 331 149
Railroad Commn. Cases, 116 U. S. 307 90, 148
Railroad Tax Cases, 13 Fed. 722 107
Raleigh v. Carolina P. & L. Co., 180 N. Car. 234 149
Raleigh &c. R. Co. v. Reid, 13 Wall. (U. S.) 269 144
Ramsey v. People, 142 Ill. 380 127
Rand v. Hartranft, 29 Wash. 591 122
Randall v. Gross, 67 Nebr. 255 90
v. Patch, 118 Maine 303 90
Randle v. Winona Coal Co., 206 Ala. 254 139
Randolph v. Good, 3 W. Va. 551 116
Range Sand-Lime B. Co. v. Great Northern R. Co., 137 Minn. 314 180
Rankin, Ex parte, 45 Nev. 173 120
Rapier, In re, 143 U. S. 110 110
Rapp v. Venable, 15 N. Mex. 509 120
Rash v. Holloway, 82 Ky. 674 107
Rast v. Van Deman, 240 U. S. 342 227
Ratcliff v. Wichita Union Stockyds. Co., 74 Kans. 1 90, 122
Raton v. Raton Ice Co., 26 N. Mex. 300 176
Rauch v. Himmelberger, 305 Mo. 70 90
Rawlins v. Georgia, 201 U. S. 638 87
Rawson v. Brown, 18 Maine 216 87
Ray v. Armstrong, 140 Ky. 800 89

[*References are to Sections.*]

Raymond v. Chicago &c. R. Co., 233 Fed. 239 89
Raymond Lumber Co. v. Raymond Light &c. Co., 92 Wash. 330 145
Raystown Water P. Co. v. Brumbaugh, 246 Pa. 225 176
Read v. Frankfort Bank, 23 Maine 318 138
Reagan v. Farmers Loan & T. Co., 154 U. S. 362 90, 126
v. Texarkana, 238 S. W. (Tex.) 717 88
Real Silk H. Mills v. Bellingham, 1 Fed. (2d) 934 107
v. Portland, 297 Fed. 897 123
Reaves v. Ainsworth, 219 U. S. 296 88, 91, 96
Reaves Warehouse Corp. v. Commonwealth, 141 Va. 194 114
Reciprocity Bank, In re, 22 N. Y. 9 151
Reclamation Dist. No. 1500 v. Superior Court, 171 Cal. 672 173
Redall v. Bryan, 24 How. (U. S.) 420 232
Redden v. State, 210 Pac. (Okla. Cr.) 556 120
Redding v. State, 91 Ga. 231 120
Redzina v. Provident Inst., 121 Atl. (N. J. Ch.) 519 88
Reed v. Baker, 42 Mich. 272 110
v. Cedar Rapids, 137 Iowa 107 89
v. Collins, 5 Cal. App. 494 120
v. Director General, 258 U. S. 92 96
v. Sampson, 54 Tex. Civ. App. 552 145
v. Seattle, 124 Wash. 185 190
v. Todd, 25 S. Dak. 421 142
v. Wright, 2 Greene (Iowa) 15 88, 93, 99, 102
Reed, Ex parte, 100 U. S. 21 87
Reelfoot Lake Lev. Dist. v. Dawson, 97 Tenn. 151 175
Reetz v. Michigan, 188 U. S. 505 88, 91, 96
Reeves v. Corning, 51 Fed. 774 123
v. State, 88 Tex. Cr. 444 120
v. Wood County, 8 Ohio St. 333 173
Regal Drug Corp. v. Wardell, 260 U. S. 386 92
Regents of University v. Williams, 9 Gill & J. (Md.) 365 81, 88, 101
Reggel, Ex parte, 114 U. S. 642 96
Reid v. Trowbridge, 78 Miss. 542 122
Reinecke v. People, 15 Ill. App. 241 152
Reinhardts' Will, In re, 92 Misc. (N. Y.) 96 87
Reinken v. Fuehring, 130 Ind. 382 172
Reinman v. Little Rock, 237 U. S. 171 123
Reiser v. William Tell Sav. F. Assn., 39 Pa. 137 102
Relief Elec. L. H. & P. Co., In re, 63 Pa. Super. Ct. 1 145
Renwick v. Davenport &c. R. Co., 47 Iowa 511 182
Republic Acceptance Corp. v. Bennett, 220 Mich. 249 151
v. De Land, 275 Fed. 632 142
Republic Iron & S. Co. v. State, 160 Ind. 379 127, 152
Republic Power & S. Co. v. Gus Blass Co., 165 Ark. 163 142, 151
Respublica v. Sparhawk, 1 Dall. (U. S.) 357 128
Revenack, In re, 62 Mo. App. 8 128
Rex v. Anon. 30, 31 Edward I 26
v. Cambridge, 8 Mod. (1715) 148 88
v. Croke, 1 Cowp. (1775) 26 88
v. Gaskin, 8 Term Reports (1799) 209 22, 25, 88
v. Justices, 3 Burrow (K. B., 1761) 1456 22
v. M'Kenzie, Russ. & Ry. Cr. Cas. (1820) 429 25
Reynolds v. Missouri, K. &c. R. Co., 228 Mass. 584 151
v. Randall, 12 R. I. 522 110
v. Schultz, 34 How. Pr. (N. Y.) 147 90
v. United States, 98 U. S. 115 219
Reynosa v. State, 100 Tex. Cr. 218 120
Rhine v. McKinney, 53 Tex. 354 89
Rhinehart v. Schuyler, 7 Ill. 473 94
v. State, 121 Tenn. 420 142
Rhode Island v. Palmer, 253 U. S. 350 120
Rice v. Efford, 3 Hen. & M. (13 Va.) 225 102
v. Foster, 4 Harr. (Del.) 479 115
v. Parkman, 16 Mass. 326 82, 87, 100
v. Roberts (Tex. Civ. App.), 177 S. W. 149 88
Richard II, In re, 1 Cobbett. Parl. Hist. Eng. (1399) 262 26
Richards v. Southern R. Co., 97 S. Car. 77 149
Riche v. Bar Harbor Water Co., 75 Maine 91 192
Richeson v. Simmons, 47 Mo. 20 104
Richman v. Consolidated Gas Co., 186 N. Y. 209 90, 221
Richmond v. Carneal, 129 Va. 388 203
v. Smith, 15 Wall. (U. S.) 429 128
v. Virginia R. & Power Co., 141 Va. 69 148
Richmond R. Co. v. Richmond, 96 U. S. 529 160
Richter v. Lighston, 161 Cal. 260 120
Ricketts v. State, 18 Ala. App. 162 120
Rider v. Regan, 114 Cal. 667 90
Rienman v. Little Rock, 237 U. S. 171 127

[*References are to Sections.*]

Riggs v. Martin, 5 Ark. 506 81, 82, 102
Riglander v. Star Co., 98 App. Div. (N. Y.) 101 88, 110
Riley v. Charleston Union S. Co., 71 S. Car. 457 180
v. Louisville, H. &c. R. Co., 142 Ky. 67 180
v. Wright, 151 Ga. 609 88
Rillito Canal Co. v. Schmidt, 11 Ariz. 49 145
Rindge Co. v. Los Angeles County, 262 U. S. 700 89, 171, 180
Rio Grande Sampling Co. v. Catlin, 40 Colo. 450 96
Rippe v. Becker, 56 Minn. 100 208
Rippey v. Texas, 193 U. S. 504 120
Risley v. Utica, 168 Fed. 737 88
Rison v. Farr, 24 Ark. 161 88, 94, 116
Risser v. Hoyt, 53 Mich. 185 90
Ritchie v. People, 155 Ill. 98 114, 127, 210
v. Wayman, 244 Ill. 509 114, 226
Ritter v. Bausman, 2 Woodw. Dec. (Pa.) 248 140
v. Drainage Dist. No. 1, 78 Ark. 580 90
v. International R. Co., 159 N. Y. S. 870 160
River Rendering Co. v. Behr, 77 Mo. 91 122
Riverside v. Riverside, 118 Fed. 736 88
Riverside &c. Cotton Mills v. Menefee, 237 U. S. 189 88, 110
Riverside Drainage Dist. v. Buckner, 108 Miss. 427 87
Riverside Park, In re, 119 Minn. 334 89
Roach v. Atchison, T. &c. R. Co., 218 U. S. 159 145, 146
Road Dist. No. 4 v. Frailey (Ill.), 145 N. E. 195 171
Roanoke Rapids Power Co. v. Roanoke Nav. &c. Co., 159 N. Car. 393 112
Robbins v. Kadyk, 312 Ill. 290 195
Roberts v. Boston, 5 Cush. (Mass.) 198 103, 105
v. Smith, 115 Mich. 5 88
v. State, 160 N. Y. 217 199
Roberts, In re, 4 Kans. App. 292 90
Robertson v. Rockford, 21 Ill. 451 185
v. Southeastern Exp. Co., 130 Miss. 305 106
v. Wilmington &c. Trac. Co., 30 Del. 155 148
Robin v. Hardaway, Jefferson (Va.) 109 32
Robinson v. Barfield, 6 N. Car. 391 88, 93
v. Ridwell, 22 Cal. 379 185
v. Swope, 12 Bush. (Ky.) 21 171
v. Wayne Circ. Judges, 151 Mich. 315 87
Robinson's Estate, In re, 112 N. Y. S. 280 110
Robison v. Haug, 71 Mich. 38 120
Roby v. Boswell, 23 Ga. 51 102
Roby v. Sheppard, 42 W. Va. 286 224
Rochester v. Gutberlett, 211 N. Y. 309 122
v. Holden, 224 N. Y. 386 112
v. Rush, 80 N. Y. 302 204, 205
v. West, 29 App. Div. (N. Y.) 125 114
Rochester, In re, 184 App. Div. (N. Y.) 369 89, 106
Rochester, In re, 92 N. Y. S. 405 202
Rochester, Matter of, 224 N. Y. 386 89
Rochester &c. R. Co. v. Joel, 41 App. Div. (N. Y.) 43 157, 160
v. Rochester, 163 N. Y. 608 149
Rochester R. Co. v. Rochester, 205 U. S. 236 144, 149
Rockaway Pac. Corp. v. Stotesbury, 255 Fed. 345 201
Rockingham County Light & P. Co. v. Hobbs, 72 N. H. 531 193
v. Philbrick, 79 N. H. 279 112, 193
Rockwell v. Nearing, 35 N. Y. 302 88
Rodge v. Kelly, 88 Miss. 209 106
Rodgers v. Kent Circ. Judge, 115 Mich. 441 107
Rogan v. Watertown, 30 Wis. 259 186
Rogers v. Burlington, 3 Wall. (U. S.) 654 185
v. Peck, 199 U. S. 425 91, 96
Roller v. Holly, 176 U. S. 398 88, 96
Rome v. Whitestown Waterworks Co., 187 N. Y. 542 176
Roosevelt v. Godard, 52 Barb. (N. Y.) 533 114
v. Meyer, 1 Wall. (U. S.) 512 232
Roquemore, Ex parte, 60 Tex. Cr. 282 116
Rose v. Charleston, 3 S. Car. 369 144
v. State, 4 Ga. App. 588 120
v. United States, 257 U. S. 655 120
Rosenbaum v. State, 131 Ark. 251 116
Rosenthal v. Chicago &c. R. Co., 255 Ill. 552 149
v. New York, 226 U. S. 260 219
Rosewell v. Bateman, 20 N. Mex. 77 89
Rosin v. Lidgerwood Mfg. Co., 89 App. Div. (N. Y.) 245 110
Ross v. Davis, 97 Ind. 79 173
v. Irving, 14 Ill. 171 93
v. New South Farm & H. Co., 191 Ill. App. 353 151
v. Stewart, 227 U. S. 530 91
Rothschild v. Steger Piano Co., 256 Ill. 196 87
Roudebush v. Mitchell, 154 Ind. 616 112
Rouse v. Donovan, 104 Mich. 234 88
v. State, 30 Wis. 129 95, 96
Rowland v. Mercer County Trac. Co., 90 N. J. L. 82 171, 195
v. Morris, 152 Ga. 842 123

[*References are to Sections.*]

Roxbury v. Boston &c. R. Corp., 6 Cush. (Mass.) 424 161
Royster Guano Co. v. Virginia, 253 U. S. 412 108
Rubi v. Provincial Board, 39 P. I. 660 114
Ruggles v. Illinois, 108 U. S. 526 124
v. Nantucket, 65 Mass. 433 128
v. State, 120 Md. 553 224
Rumbo v. Winterrowd (Tex. Civ. App.), 228 S. W. 258 90, 114
Rumford &c. Bridge Dist. v. Mexico Bridge Co., 115 Maine 154 180
Runge v. Glerum, 37 N. Dak. 618 90
v. Wyatt, 25 Tex. 291 110
Ruppert v. Caffey, 251 U. S. 264 120
Rushville v. Rushville Nat. Gas Co., 132 Ind. 575 180
Rushville Gas Co. v. Rushville, 121 Ind. 206 204
Russell v. Fargo, 28 N. Dak. 300 128
v. Mayor, 2 Denio (N. Y.) 461 128
v. State, 88 Tex. Cr. 582 120
Rust, Ex parte, 181 Cal. 73 110
Ruston v. Fountain, 118 La. 53 120
Rutherford v. Hudson River T. Co., 73 N. J. L. 227 149
Rutherford's Case, 72 Pa. St. 82 88, 124
Rutland R. L. & P. Co. v. Clarendon Power Co., 86 Vt. 45 193
Ryan v. Louisville & N. Term. Co., 102 Tenn. 111 180
v. Thomas, 4 Wall. (U. S.) 603 232
Ryers, In re, 72 N. Y. 1 173
Ryerson v. Brown, 35 Mich. 333 187, 192
v. Shaw, 277 Ill. 524 142, 151

S

Sabre v. Rutland R. Co., 86 Vt. 347 114, 149
Saco v. Wentworth, 37 Maine 165 87, 88, 93, 99, 118
Saddler v. State, 148 Ga. 462 120
Sadler v. Langham, 38 Ala. 311 187, 188, 192
Saengerbund v. State, 6 Boyce (Del.) 47 120
Saffold v. Mangum, 139 Ga. 119 91
Sage v. Dillard, 54 Ky. 341 139, 146
Saginaw County v. Hubinger, 137 Mich. 72 144
St. Clair v. Cox, 106 U. S. 350 151
St. Germain Irr. Co. v. Hawthorn Ditch Co., 32 S. Dak. 260 112
St. Helena v. San Francisco, N. &c. R. Co., 24 Cal. App. 71 149
Saint John v. United States, 268 Fed. 808 91
St. Joseph D. &c. R. Co. v. Buchanan County Court, 39 Mo. 485 185
St. Louis v. Alexander, 23 Mo. 483 185
v. Glasgow, 254 Mo. 262 176
v. Missouri Pac. R. Co., 278 Mo. 205 89, 97
v. St. Louis &c. R. Co., 228 Mo. 712 149
St. Louis &c. R. Co. v. Gill, 54 Ark. 101 148
v. Gill, 156 U. S. 649 162
v. Hart, 45 Okla. 659 149
v. Higgs, 42 Okla. 171 159
v. Lewis, 28 Okla. 453 149
v. Middlekamp, 256 U. S. 226 89
v. Ryan, 56 Ark. 245 148, 162
v. Steele, 37 Okla. 536 159
v. Sutton, 29 Okla. 553 149
v. Williams, 251 U. S. 63 91
v. Troy, 25 Okla. 749 149
St. Louis Coal Co. v. Illinois, 185 U. S. 203 217
St. Louis County v. Griswold, 58 Mo. 175 202
St. Louis Gaslight Co. v. St. Louis Gas, F. & P. Co., 16 Mo. App. 52 122
St. Louis, I. M. &c. R. Co. v. Adcock, 52 Ark. 406 149
v. Bellamy, 113 Ark. 384 149
v. Davis, 132 Fed. 629 108
v. Ft. Smith &c. R. Co., 104 Ark 344 180
v. Loftin, 30 Ark. 693 144
v. Paul, 173 U. S. 404 152
v. Pfau, 212 Mo. 398 87
v. State, 88 Ark. 338 149
v. State, 31 Okla. 509 149
v. Watson, 223 U. S. 745 107
v. Williams, 251 U. S. 63 90
St. Louis M. & B. Term. R. Co. v. Callahan, 194 U. S. 628 96
St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350 108, 142
v. Johnson, 38 Tex. Civ. App. 322 149
v. State, 97 Ark. 473 149
St. Mary's Indus. School v. Brown, 45 Md. 310 195
St. Paul v. Chicago, St. P. M. &c. R. Co., 139 Minn. 322 149
v. Minnesota Trans. R. Co., 155 Minn. 237 149
St. Paul Tr. & Sav. Bank v. American Clearing Co., 291 Fed. 212 168, 171, 178
St. Vincent's College v. Schaefer, 104 Mo. 261 144
Salant v. Pennsylvania R. Co., 188 App. Div. (N. Y.) 851 110
Salem v. Eastern R. Co., 98 Mass. 431 90
Sales, Ex parte, 108 Okla. 29 92, 114, 123
Salina v. Lewis, 52 Utah 7 120
Sally v. Berwind-White Coal M. Co., 5 Pa. Dist. 316 152
Salt Creek Valley Tpk. Co. v. Parks, 50 Ohio St. 568 89
Saltpetre's Case, 7 Coke (1607) 12 128

[*References are to Sections.*]

Sampeyreac v. United States, 7 Pet. (U. S.) 222 104
Sample v. Chicago, B. &c. R. Co., 233 Ill. 564 149
Samuels v. McCurdy, 267 U. S. 188 90
San Antonio v. Jones, 28 Tex. 19 185
v. Lane, 32 Tex. 405 185
San Antonio &c. R. Co. v. State, 79 Tex. 264 149
San Antonio Gas Co. v. State, 22 Tex. Civ. App. 118 153
San Antonio Pub. Serv. Co. v. San Antonio, 257 Fed. 467 148
San Antonio Trac. Co. v. Altgelt, 200 U. S. 304 160
Sandefur v. Canoe Creek Coal Co., 293 Fed. 379 87
Sandel v. State, 115 S. Car. 168 198
Sanderlin v. Luken, 152 N. Car. 738 173
Sanders v. Cabaniss, 43 Ala. 173 104
San Diego Land &c. Co. v. Jasper, 89 Fed. 274 90
v. National City, 174 U. S. 739 90, 127
Sandpoint Water & L. Co. v. Sandpoint, 31 Idaho 498 148
San Francisco v. Liverpool Ins. Co., 74 Cal. 113 199
Sanger v. Chesapeake &c. R. Co., 102 Va. 86 159
Sanitary Dist. v. Chicago &c. R. Co., 267 Ill. 252 114
San Joaquin &c. R. C. & Irr. Co. v. Stanislaus County, 113 Fed. 930 162
v. Stevenson, 164 Cal. 221 177
San Jose Ranch Co. v. San Jose Land & W. Co., 126 Cal. 322 91
San Mateo County v. Southern Pac. R. Co., 13 Fed. 722 154, 155
v. Southern Pac. R. Co., 116 U. S. 138 64
Santa Clara County v. Southern Pac. R. Co., 18 Fed. 385 8, 154, 156
v. Southern Pacific R. Co., 118 U. S. 394 86, 88
Santa Clara Valley Land Co. v. Meehan, 62 Cal. App. 531 89
Santa Cruz Co. v. Santa Cruz R. Co., 111 U. S. 361 86
Santo v. State, 2 Iowa 165 118
Sarah, The, 8 Wheat. (U. S.) 391 87
Sargent v. Board of Education, 177 N. Y. 317 195
Sarrls v. Commonwealth, 83 Ky. 327 120
Satterlee v. Matthewson, 2 Pet. (U. S.) 380 84
Saunders v. Arlington, 147 Ga. 581 207
Savannah v. Mulligan, 95 Ga. 323 128
Savannah, F. &c. R. Co. v. Postal Tel. & C. Co., 115 Ga. 554 112
Sawyer v. Botti, 147 Iowa 453 120
Sayles v. Foley, 38 R. I. 484 96
Saylor v. Duel, 236 Ill. 429 91
Sayre v. Phillips, 148 Pa. St. 482 107
Scammon v. Chicago, 42 Ill. 192 169
Scanlan v. Boston, 140 Mass. 84 149
Scantland v. Commonwealth, 29 Ky. (6 J. J. Marsh.) 585 87
Scappoose Drainage Dist, In re (Ore.), 237 Pac. 684 173
Scatena v. Caffey, 260 Fed. 756 120
Schaaf v. South Dakota Rural Credits Bd., 39 S. Dak. 377 203
Schachter v. Hauenstein, 92 N. J. L. 104 116
Schadt Motor T. Co. v. Dengenhart, 10 Ohio App. 100 87
Schaefer v. United States, 251 U. S. 466 128
Schemerhorn v. General Elec. Co., 195 App. Div. (N. Y.) 670 90
Schenck v. United States, 249 U. S. 47 128
Schenectady &c. Rd. Co. v. Thatcher, 11 N. Y. 108 141
Schenley v. Allegheny, 25 Pa. 128 169
Schieffelin v. Hylan, 236 N. Y. 254 195
Schiller Piano Co. v. Illinois Northern Utils. Co., 288 Ill. 580 114, 145
Schlict v. State, 31 Ind. 246 120
Schmidinger v. Chicago, 226 U. S. 578 115, 123, 210
Schmidt v. Cobb, 119 U. S. 286 120
v. Indianapolis, 168 Ind. 631 120
Schmitt v. F. W. Cook Brewing Co., 187 Ind. 623 120, 212
Schneider v. Menasha, 118 Wis. 298 207
Schollenberger v. Pennsylvania, 171 U. S. 1 229
School Board v. Alexander, 126 Va. 407 195
School Directors v. Breen, 60 Ill. App. 201 128
Schumacher v. Pennsylvania R. Co., 106 Misc. (N. Y.) 564 106
Schumacker v. Little Falls Tp. (N. J.), 108 Atl. 113 116
Schwab v. Berggren, 143 U. S. 442 96
Schwartz v. People, 46 Colo. 239 120
Schwuchow v. Chicago, 68 Ill. 444 120
Scott v. Brackett, 89 Ind. 413 88, 90
v. Columbus, 109 Ohio 193 89
v. Frazier, 258 Fed. 669 197, 209
v. Nashville Bridge Co., 143 Tenn. 86 110
v. Toledo, 36 Fed. 385 88, 89
Scotland County v. Missouri, I. &c. R. Co., 65 Mo. 123 144
Scottish U. & N. Ins. Co. v. Bowland, 196 U. S. 611 94, 96
v. Wade, 59 Tex. Civ. App. 631 142
Scovill v. McMahon, 62 Conn. 378 115
Scudder v. Trenton Del. Falls Co., 1 N. J. Eq. 694 187

[*References are to Sections.*]

Seaboard Air Line R. Co. v. Railroad Commn., 155 Fed. 792 142
Searl v. School District, 133 U. S. 553 112
Sears v. Akron, 246 U. S. 242 89, 150
v. Board of Aldermen, 173 Mass. 71 172
v. Cottrell, 5 Mich. 251 94, 101, 120
v. Street Commrs., 173 Mass. 350 168, 172
v. Warren, 36 Ind. 267 107
Seattle, In re, 42 Wash. 551 112
Second Employers' Liability Cases, 223 U. S. 1 96, 108, 109
Security Finance Co. v. Hendry, 189 N. Car. 549 89
Security Mut. Life Ins. Co. v. Prewitt, 202 U. S. 246 145
Security Sav. Bank v. California, 263 U. S. 282 88, 91, 228
Security Trust &c. Co. v. Lexington, 203 U. S. 323 89
See v. Wabash R. Co., 123 Iowa 443 149
Seeleyville Coal & M. Co. v. McGlosson, 166 Ind. 561 152
Seibert v. Missouri Pac. R. Co., 188 Mo. 657 149
Seiders v. Toledo, 83 Ohio St. 495 88
Seitzinger v. December Oil Co., 1 Leg. Chron. (Pa.) 234 145
Selective Draft Cases, 245 U. S. 366 128
Sellards v. Zomes, 68 Ky. 90 128
Selma Gulf R. Co., Ex parte, 45 Ala. 696 185
Selover v. Walsh, 226 U. S. 112 142
Selvage v. Talbott, 175 Ind. 648 123
Sentell v. New Orleans &c. R. Co., 166 U. S. 698 90, 128, 159
Sessions v. Crunkelton, 20 Ohio St. 349 113
Seton Hall College v. South Orange, 242 U. S. 100 144
Seven Barrels of Wine, In re, 79 Fla. 1 90, 123
Sewall v. Roberts, 115 Mass. 262 102
Seward v. Roberts, 29 Barb. (N. Y.) 239 103
v. Denver &c. R. Co., 17 N. Mex. 557 149
Sexauer v. Star Milling Co., 173 Ind. 342 188
Sexton v. Elizabeth City, 169 N. Car. 385 171
v. Newark Dist. Tel. Co., 84 N. J. L. 85 88, 96
Seymour v. Hartford, 21 Conn. 481 144
Shade v. Ash Grove Lime &c. Co., 93 Kans. 257 96
Shaffer v. Carter, 252 U. S. 37 108
Shaftesbury's Case, 6 Howell St. Tr. (1676) 1269 21
Sharp v. Eagle Lake Lumber Co., 60 Cal. App. 386 145
v. Quincy, O. &c. R. Co., 139 Mo. App. 525 159
Sharp, In re, 15 Idaho 120 87, 91
Sharpless v. Longport, 79 N. J. L. 279 172
v. Philadelphia, 21 Pa. 147 165, 166, 179, 181, 182, 184
Sharum v. Meriwether, 156 Ark. 331 87
Shasta Power Co. v. Walker, 149 Fed. 568 193
Shaver v. Starrett, 4 Ohio St. 494 171
Shaw v. Dennis, 5 Gil. (Ill.) 405 181
v. Mayfield, 204 Ky. 618 89
v. Robinson, 111 Ky. 715 91
v. Silverstein, 21 R. I. 500 89
v. Standard Piano Co., 87 N. J. Eq. 350 90
Shea v. Muncie, 148 Ind. 14 120
Shealy v. Seaboard Air Line R. Co., 131 S. Car. 144 90
Shelby v. Cleveland Mill & P. Co., 155 N. Car. 196 114, 145
Shelby County v. Tennessee C. Exposition Co., 96 Tenn. 653 195
Sheldon v. Hoyne, 261 Ill. 222 106
Shellabarger El. Co. v. Illinois Cent. R. Co., 278 Ill. 333 110
Shelton v. White, 163 N. Car. 90 173
Shepard v. Springfield Fire & M. Ins. Co., 42 R. I. 174 91
Shepherd v. Grimmett, 3 Idaho 403 116
Shepherds' Fold v. Mayor of New York, 96 N. Y. 137 195
Sheppard v. Johnson, 21 Tenn. 285 88, 90, 102
Sherburne v. Portsmouth, 72 N. H. 539 207
Sheriffs of London, In re, 2 Liber Custumarum (1321) 410 26
Sherman v. Buick, 32 Cal. 241 171
v. Carr, 8 R. I. 431 198
v. Smith, 1 Black (U. S.) 587 147, 151
Shewmake Bros. v. Dominy, 147 Ga. 577 89
Shields v. Ohio, 95 U. S. 319 137
Shiffett v. Kelly, 16 Ga. App. 91 141
Shippen Bros. Lumber Co. v. Elliott, 134 Ga. 699 89
Shirley v. Fagg, 6 Howell St. Tr. (1675) 1121 2
Shoemaker v. United States, 147 U. S. 282 205
Shoenberger v. School Directors, 32 Pa. 34 102
Shorter In re, Fed. Cas. No. 12,811 116
Shotwell v. St. Joseph &c. R. Co., 37 Mo. App. 654 159
Shove v. Manitowoc, 57 Wis. 5 89
Shover v. State, 10 Ark. 259 116
Showalter v. Ehlan, 5 Pa. Sup. Ct. 242 152
Shreveport v. Shreveport Belt R. Co., 107 La. 785 149
v. Schulsinger, 113 La. 9 123
Shultise v. Taloga, 42 Okla. 65 172
Shumate v. Heman, 181 U. S. 402 170

[*References are to Sections.*]

Shurman v. Atlanta, 148 Ga. 1 89
Sick v. Bay St. Louis, 113 Miss. 175 175
Siddons v. Edmonston, 42 App. D. C. 459 107, 116
Silber v. Bloodgood, 177 Wis. 608 120
Silverberg Bros. v. Douglass, 62 Misc. (N. Y.) 340 116
Silvey v. Montgomery County, 273 Fed. 202 88
Simmons v. Northern Pac. R. Co., 147 Minn. 313 180, 194
v. Western Union T. Co., 63 S. Car. 425 123
Simmons Med. Co. v. Ziegenhein, 145 Mo. 369 196
Simon v. Craft, 182 U. S. 427 88, 89, 90
Simonds v. Simonds, 103 Mass. 572 104
Simpson v. Commonwealth (Ky. App.), 244 S. W. 912 120
v. Hopkins, 82 Md. 478 108
v. O'Hara, 243 U. S. 629 131
Sinclair v. State, 69 N. Car. 47 107
Sing Lee, In re, 54 Fed. 334 87, 107
Sing Tuck v. United States, 128 Fed. 592 88
Sing Tuck, In re, 126 Fed. 386 91
Sinking Fund Cases, 99 U. S. 700 122, 124, 159, 221
Sioux City Stock Yds. Co., In re, 149 Iowa 5 89
Sioux City St. R. Co. v. Sioux City, 138 U. S. 98 149, 160
Sioux Falls v. Farmers' L. & Tr. Co., 136 Fed. 721 204
Sioux Falls Co. v. Caldwell, 230 Fed. 236 151
Sioux Falls Light & P. Co. v. Coughram, 27 S. Dak. 443 193
Sipe v. Tarentum, 263 Pa. 338 171
Sire v. Berkshire, 185 Fed. 967 91
Sirrine v. State (S. Car.), 128 S. E. 172 104
Sisson v. Board of Supervisors, 128 Iowa 442 173
Sixth Ave. R. Co. v. Gilbert El. R. Co., 3 Abb. N. C. (N. Y.) 372 157
Skaneateles Water Wks. Co. v. Skaneateles, 184 U. S. 354 204
Skinner v. Garnett Gold Min. Co., 96 Fed. 735 152, 159
v. Thomas, 171 N. Car. 98 114
Slack v. Maysville &c. R. Co., 13 B. Mon. (Ky.) 1 181, 185
Slaughter v. Commonwealth, 13 Gratt. (Va.) 767 142
Slaughter House Cases, 16 Wall. (U. S.) 36 8, 76, 86, 112, 122, 124
Sleadd v. Southern R. Co., 109 Ky. 214 159
Sligh v. Grand Rapids, 84 Mich. 497 88
Slimmer's Est., In re, 141 Minn. 131 91
Sloan v. Lawrence County, 134 Ark. 121 89
Slocomb v. Fayetteville, 125 N. Car. 362 204
Small v. Hammes, 156 Ind. 556 152
Small Co. v. American Sugar R. Co., 267 U. S. 233 132
Smathers v. Western Carolina Bank, 135 N. Car. 410 151
Smith v. Alabama, 124 U. S. 465 126
v. Atchison, T. &c. R. Co., 64 Fed. 272 140
v. Cameron, 106 Ore. 1 112, 177, 179
v. Cleveland, C. C. &c. R. Co., 170 Ind. 382 180
v. Commonwealth Land &c. Co., 172 Ky. 607 145
v. Empire State-Idaho M. & D. Co., 127 Fed. 462 151
v. Farr, 46 Colo. 364 107
v. Hitchcock, 226 U. S. 53 88
v. Hurlburt, 108 Ore. 690 89
v. Kentucky & W. Va. P. Co., 207 Ky. 401 180
v. Mahoney, 22 Ariz. 342 107
v. Mississippi, 162 U. S. 592 104
v. Nashville, 88 Tenn. 464 204, 205
v. Packard, 12 Wis. 371 94
v. Smith, 2 Miss. 102 103
v. State, 9 Tenn. 228 87
v. State, 90 Tenn. 575 152
v. State, 42 Tex. Cr. 220 104
v. State, 44 Tex. Cr. 90 104
v. State, 45 Tex. Cr. 405 104
v. State Bd. of Med. Exam., 140 Iowa 66 88
v. Stephens, 173 Ind. 564 108
v. Texas, 233 U. S. 630 110
v. Townley Mfg. Co. (Mo.), 218 S. W. 870 152
v. Warrior, 99 Ala. 481 120
Smith, In re, 143 Cal. 368 214
Smith, In re, 193 Cal. 337 90
Smith's Petition, In re, 9 Wash. 85 89
Smith & Keating, Ex parte, 38 Cal. 702 103
Smyth v. Ames, 169 U. S. 466 90, 108, 126
v. Ames, 171 U. S. 361 229
Snell, In re, 58 Vt. 207 118
Snelling v. National Trav. Ben. Assn., 102 Kans. 227 151
Snidow v. Giles County, 96 S. E. (Va.) 810 157
Snook v. Georgia Imp. Co., 83 Ga. 61 141, 142
Snyder v. Foster, 77 Iowa 638 181
v. Marks, 109 U. S. 189 89
v. Rockport, 6 Ind. 237 169
Societe Fonciere Et Agricole v. Milliken, 135 U. S. 304 151
Society of the Holy Name v. Pierce, 296 Fed. 928 130, 132, 228
Soens v. Racine, 10 Wis. 271 175
Sohier v. Trinity Church, 109 Mass. 1 115
Soliah v. Heskin, 222 U. S. 522 89
Solomon v. Farver, 52 Ga. 405 197

[*References are to Sections.*]

Sommerville v. St. Louis Min. &c. Co., 46 Mont. 268 140, 151
Sonoma County Tax Case, 13 Fed. 789 89
Sonsmith v. Pere Marquette R., 173 Mich. 57 96
Soon Hing v. Crowley, 113 U. S. 703 86, 222
Sorenson v. Webb, 111 Miss. 87 152
South Bay Meadow Dam Co. v. Gray, 30 Maine 547 151
South Carolina v. McMaster, 237 U. S. 63 142
Southeastern Exp. Co. v. Miller, 264 U. S. 535 132, 231
Southern Bell T. & T. Co. v. Birmingham, 211 Fed. 709 148
v. Railroad Commn., 280 Fed. 901 143
Southern Bitulithic Co. v. Algiers R. & L. Co., 130 La. 496 119
Southern Illinois &c. Bridge Co. v. Stone, 174 Mo. 1 180
Southern Indiana R. Co. v. Bedford, 165 Ind. 272 149
Southern Pac. Co. v. Board of Commrs., 78 Fed. 236 90, 162
v. California Adjust. Co., 237 Fed. 954 90
v. Campbell, 230 U. S. 537 148
v. Denton, 146 U. S. 202 115
v. Los Angeles Mill Co., 177 Cal. 395 180
Southern Power Co. v. Walker, 89 S. Car. 84 180, 193
Southern R. Co. v. Durham, 266 U. S. 178 87
v. Greene, 160 Ala. 396 142
v. Lowe, 139 Ga. 362 91
v. Memphis, 126 Tenn. 267 112, 202
v. Oliver, 102 Va. 710 87
Southern Realty Co. v. Tchula Co-op. Stores, 114 Miss. 309 145
Southern Utils. Co. v. Palatka (Fla.) 99 So. 236 90, 145
Southern Wisconsin Power Co., In re, 140 Wis. 245 180, 193
Southern Wisconsin R. Co. v. Madison, 240 U. S. 457 149
South Pacific R. Co. v. Laclede County, 57 Mo. 147 144
South Park Commrs. v. Chicago City R. Co., 286 Ill. 504 149
South Platte Land Co. v. Buffalo, 7 Nebr. 253 97
Southwestern Sur. Ins. Co. v. Anderson (Tex. Civ. App.), 152 S. W. 816 145
Southwestern T. & T. Co. v. Dallas, 104 Tex. 114 148
v. Krause (Tex. Civ. App.), 92 S. W. 431 159
Southwest Missouri L. Co. v. Scheurich, 174 Mo. 235 187, 192
Spalding v. Preston, 21 Vt. 9 90
Spann v. Dallas, 111 Tex. 350 114
Sparhawk v. Sparhawk, 116 Mass. 315 104
Spaulding v. Lowell, 23 Pick. (Mass.) 71 195
Spaulding v. McNary, 64 Ore. 491 123
v. Peabody, 153 Mass. 129 204
Specht v. Commonwealth, 8 Pa. 312 116
Speer v. School Directors, 50 Pa. St. 150 200
v. Stephenson, 16 Idaho 707 91
Spencer v. Merchant, 125 U. S. 345 169
Sperry v. State, 188 Ind. 173 106
v. Weigle, 166 Wis. 613 91
Spiegler v. Chicago, 216 Ill. 114 114
Spies v. Illinois, 123 U. S. 131 8
Spokane v. Merriam, 80 Wash. 222 202
v. Spokane &c. R. Co., 75 Wash. 651 149, 180
v. Thompson, 69 Wash. 650 180
Spokane Hotel Co. v. Younger, 113 Wash. 359 131
Sporza v. German Sav. Bank, 192 N. Y. 8 89
Sprigg v. Western Tel. Co., 46 Md. 67 139, 141
Springer v. United States, 102 U. S. 586 94
Springfield v. Gay, 12 Allen (Mass.) 612 169, 173
Springfield Realty Co., In re, 257 Fed. 785 151
Spring Valley Water Wks. v. Bartlett, 16 Fed. 615 90
v. San Francisco, 124 Fed. 574 90
v. Schottler, 110 U. S. 347 148, 162
Spry v. Freeman, 85 Okla. 119 91
S. S. White Dental Mfg. Co. v. Commonwealth, 212 Mass. 35 142
Staates v. Washington, 44 N. J. L. 605 120
Stacks v. State, 20 Ala. App. 462 115
Staffel v. School Board (Tex. Civ. App.), 201 S. W. 413 128
Stafford v. Wallace, 258 U. S. 495 122
Standard Home Co. v. Davis, 217 Fed. 904 151
Standard Oak Veneer Co., In re, 173 Fed. 103 151
Standard Oil Co. v. Missouri, 224 U. S. 270 91, 96, 142, 153
v. United States, 221 U. S. 1 132, 153
Stanfeal v. State, 78 Ohio St. 24 116
Staniford v. Barry, 1 Aikens (Vt.) 314 104
Stanislaus County v. San Joaquin &c. Canal & Irr. Co., 192 U. S. 201 162
Stanley v. Stanley, 26 Maine 191 151
Stanley Liquor Co. v. People, 63 Colo. 456 90
Starin v. Genoa, 23 N. Y. 439 185
Stark Elec. R. Co. v. McGinty, 238 Fed. 657 145

[*References are to Sections.*]

Stark's Estate, In re, 118 Misc. (N. Y.) 240 87
Starr v. Pease, 8 Conn. 541 104
Starr, Ex parte, 263 Fed. 145 128
Starr Burying Ground Assn. v. North Lane Cem. Assn., 77 Conn. 83 194
State v. ———, 2 N. Car. 28 79, 93
v. Abbey, 15 Ohio Cir. Ct. (N. S.) 261 200
v. Aberdeen, 34 Wash. 61 88
v. Abraham, 64 Wash. 621 89
v. Ackerly, 69 Fla. 23 224
v. Adams, 44 Mo. 570 116
v. Aetna Cas. & Sur. Co., 84 Fla. 123 89, 91
v. Agey, 171 N. Car. 831 142, 151
v. Ah Chew, 16 Nev. 50 104
v. Aiken, 42 S. Car. 222 120, 203
v. Alabama Bible Soc., 134 Ala. 632 144
v. Alderson, 49 Mont. 29 142
v. Allen, 2 McCord (S. Car.) 55 91, 93
v. Allen, 178 Mo. 555 204, 205
v. Allmond, 2 Houst. (Del.) 612 120
v. Almy, 67 N. H. 274 87
v. American Book Co., 69 Kans. 1 151
v. American Sugar Ref. Co., 138 La. 1005 142
v. American Surety Co., 91 Nebr. 22 142
v. Anderson, 144 Tenn. 564 159
v. Anding, 152 La. 259 120
v. Archinard, 152 La. 786 120
v. Arkansas Lumber Co., 260 Mo. 212 153
v. Armour Packing Co., 173 Mo. 356 153
v. Armour Packing Co., 265 Mo. 121 153
v. Armstrong, 19 Utah 117 89
v. Ashbrook, 154 Mo. 375 106
v. Atchison, T. &c. R. Co., 95 Kans. 22 149
v. Atlantic &c. R. Co., 164 N. Car. 422 149
v. Atlantic Coast Line R. Co., 56 Fla. 617 110
v. Atlantic Coast Line R. Co., 60 Fla. 465 149
v. Back, 72 Nebr. 402 89
v. Baker, 152 La. 257 120
v. Balch, 178 Mo. 392 152
v. Baltimore &c. R. Co., 48 Md. 49 144
v. Baltimore &c. R. Co., 127 Md. 434 144
v. Baltimore &c. R. Co., 24 W. Va. 783 116
v. Bancroft, 148 Wis. 124 112, 157, 192
v. Barksdale, 181 N. Car. 621 120
v. Barrett, 172 Ind. 169 145, 229
v. Barrett, 138 N. Car. 639 120
v. Barringer, 110 N. Car. 525 120
State v. Bates, 235 Mo. 262 175
v. Bates, 14 Utah 293 87
v. Becker, 3 S. Dak. 29 120
v. Beil, 157 Ind. 25 128
v. Belle Springs Creamery Co., 83 Kans. 389 90
v. Bentley, 163 Wis. 632 195, 196
v. Bergfeldt, 41 Wash. 234 116
v. Berlin, 21 S. Car. 292 120
v. Beswick, 13 R. I. 211 124
v. Billings Gas Co., 55 Mont. 102 148
v. Birmingham Water Wks. Co., 185 Ala. 388 145
v. Bixman, 162 Mo. 1 120, 142
v. Blaisdell, 22 N. Dak. 86 91
v. Blake, 241 Mo. 100 142
v. Blake, 36 N. J. L. 442 173, 174
v. Board of Commrs., 87 Minn. 325 173, 174
v. Board of Commrs., 18 Wyo. 153 120
v. Board of Education, 76 Ohio St. 297 128
v. Board of Education, 21 Utah 401 128
v. Board of Supervisors, 102 Minn. 442 112, 173
v. Board of Trustees, 175 Mo. 62 144
v. Bonnell, 119 Ind. 494 120
v. Bonneval, 128 La. 902 162
v. Borstad, 27 N. Dak. 533 90
v. Boswell, 104 Ind. 541 96
v. Bowen, 3 Strob. (S. Car.) 573 115
v. Bray, 153 La. 103 104
v. Brennan's Liquors, 25 Conn. 278 88, 120
v. Brett, 16 Mont. 360 96
v. Brictson Mfg. Co. (Nebr.), 205 N. W. 246 140
v. Briggs, 46 Utah 288 120
v. Brothers, 144 Minn. 337 120
v. Brown, 111 Minn. 80 202
v. Brown, 170 N. Car. 714 123
v. Brown, 105 Ohio St. 479 90
v. Brown & S. Mfg. Co., 18 R. I. 16 110, 154, 163
v. Bryan, 87 Fla. 56 107
v. Bunting, 71 Ore. 259 114
v. Burbage, 172 N. Car. 876 116
v. Burgoyne, 7 Lea. (Tenn.) 173 91
v. Burnes, 124 Minn. 471 172
v. Burnett, 6 Heisk. (53 Tenn.) 186 104, 106
v. Burr, 79 Fla. 290 148
v. Bush, 12 La. App. 309 97
v. Cadigan, 73 Vt. 245 110
v. Cage, 34 La. Ann. 506 175
v. Calloway, 11 Idaho 719 120
v. Campbell, 206 Mo. 579 116
v. Cannon, 125 Wash. 515 142
v. Cantwell, 179 Mo. 245 216, 222, 228, 229
v. Cary, 166 Wis. 103 91

[*References are to Sections.*]

State v. Cassassa, 186 Pac. (Wash.) 872 120
v. Cassidy, 22 Minn. 312 195
v. Caster, 30 Wyo. 22 199
v. Centennial Brew. Co., 55 Mont. 500 120
v. Central Lumber Co., 24 S. Dak. 136 114
v. Certain Intox. Liquors, 51 Utah 569 120
v. Charleston, 10 Rich. L. (S. Car.) 491 181, 185
v. Chase, 106 Ore. 263 104
v. Cheney, 45 W. Va. 478 91
v. Chesney (Okla. Cr.), 233 Pac. 236 116
v. Chicago &c. R. Co., 145 Ind. 229 142
v. Chicago, B. &c. R. Co., 29 Nebr. 412 149
v. Chicago, M. &c. R. Co., 115 Minn. 51 160, 180
v. Chicago, M. &c. R. Co., 118 Minn. 380 160
v. Chicago M. &c. R. Co. 122 Minn. 280 149
v. Chicago, M. &c. R. Co., 135 Minn. 277 119
v. Chicago, M. &c. R. Co., 182 Wis. 605 149
v. Chicago, St. P. &c. R. Co., 148 Minn. 91 149
v. Cincinnati St. R. Co., 97 Ohio St. 283 186
v. Clausen, 65 Wash. 156 96, 114, 226, 229
v. Clausen, 95 Wash. 214 201
v. Clausen, 110 Wash. 525 177
v. Clausen, 113 Wash. 570 201
v. Clay County, 20 Nebr. 452 192
v. Clement Nat. Bank, 84 Vt. 167 88, 141
v. Cline, 91 Kans. 416 106
v. Cole, 158 La. 799 96
v. Cole, 220 Mo. 697 128
v. Coleman, 96 Conn. 190 114
v. Colorado So. N. O. &c. R. Co., 120 La. 9 159
v. Commissioner of R. Taxation, 37 N. J. L. 228 144, 156
v. Commissioner of R. Taxation, 37 N. J. L. 240 144
v. Comstock, 27 Vt. 553 96
v. Condon, 108 Tenn. 82 106
v. Conlin, 27 Vt. 318 87, 113, 120
v. Consolidation Coal Co., 46 Md. 1 148
v. Continental Tobacco Co., 177 Mo. 1 153
v. Cook, 81 W. Va. 686 104
v. Cornell, 53 Nebr. 556 195
v. Corron, 73 N. H. 434 120
v. Cote, 122 Maine 450 92
v. Country Club, 173 S. W. (Tex. Civ. App.) 570 120
v. County Commrs., 5 Nev. 317 89
State v. Crawford (Fla.) 105 So. 446 142
v. Creamer, 85 Ohio St. 349 96, 226
v. Creamery Pkg. Mfg. Co., 110 Minn. 415 142
v. Crescent Cotton Oil Co., 116 Miss. 398 142
v. Crittenden County Court, 19 Ark. 360 144
v. Crosson, 33 Idaho 140 106
v. Crowe, 130 Ark. 272 131, 214, 225, 229, 235
v. Crystal Lake Cem. Assn., 155 Minn. 187 144
v. Cullom, 138 La. 395 152
v. Cummins, 30 Idaho 411 120
v. Curran, 12 Ark. 321 145, 147
v. Currans, 111 Wis. 431 123
v. Danenberg, 151 N. Car. 788 123
v. Davidson, 114 Wis. 563 197
v. Davis, 171 N. Car. 809 116
v. Davis, 96 Ohio St. 301 120
v. Davis, 213 Pac. (Kans.) 171 201
v. Dayton &c. R. Co., 36 Ohio St. 434 149
v. Dean, 149 Minn. 410 116
v. Delaye, 193 Ala. 500 120
v. Delmar Jockey Club, 200 Mo. 34 145
v. Denton, 164 N. Car. 530 120
v. Derry, 171 Ind. 18 88, 90
v. District Court, 90 Minn. 457 91
v. District Court, 34 Mont. 535 180
v. Dixon, 66 Mont. 76 201
v. Dodd, 51 Mont. 100 224
v. Doherty, 60 Maine 504 94
v. Dolan, 13 Idaho 693 116
v. Donehey, 8 Iowa 396 120
v. Doran, 28 S. Dak. 486 107
v. Douglas County, 47 Nebr. 428 202
v. Droppo, 126 Minn. 68 120
v. Duluth Bd. of Trade, 107 Minn. 506 153
v. Duluth St. R. Co., 88 Minn. 158 160
v. Durein, 46 Kans. 695 87
v. Edwards, 86 Maine 102 90
v. Eicher (Mo.) 178 S. W. 171 173
v. Eirick, 84 Ohio St. 503 171
v. Emery, 189 Wis. 564 114
v. Erwin, 139 Tenn. 341 89
v. Fabri, 98 Wash. 207 120
v. Fahey (Del.), 126 Atl. 730 120
v. Fargo Bottling Wks., 19 N. Dak. 396 120
v. Feilen, 70 Wash. 65 229
v. Felch, 92 Vt. 477 97
v. Ferguson, 69 Mo. 495 91
v. Fernandez, 39 La. Ann. 538 116
v. Ferris, 53 Ohio St. 314 106
v. Finlayson, 41 N. Dak. 494 87
v. Firemen's Fund Ins. Co., 152 Mo. 1 153

[*References are to Sections.*]

State v. Northern Pac. R. Co., 89 Minn. 363 149
v. Northern Pac. R. Co., 128 Wash. 73 149
v. Northern Pac. R. Co., 157 Wis. 73 139
v. Noyes, 47 Maine 189 157
v. Noyes, 30 N. H. 279 118, 227
v. O'Connell, 99 Maine 61 235
v. Ogden Rapid Trans. Co., 38 Utah 242 149
v. O'Rear, 277 Mo. 303 207
v. Orfanakis, 22 N. Mex. 107 91
v. Orr, 68 Conn. 101 122
v. Osawkee Tp., 14 Kans. 418 197
v. Oshkosh, 84 Wis. 548 89
v. Parker, 87 Fla. 181 87
v. Parker Distilling Co., 236 Mo. 219 120
v. Paul, 5 R. I. 185 88, 120
v. Peel Splint Coal Co., 36 W. Va. 802 152
v. Penny, 42 Mont. 118 114, 116
v. Peoples, 131 N. Car. 784 104
v. Perley, 173 N. Car. 783 114
v. Persica, 130 Tenn. 48 120
v. Pete, 153 La. 943 120
v. Peterson, 107 Kans. 641 90
v. Petit, 74 Minn. 376 214
v. Phillips, 107 Maine 249 123
v. Phillips, 109 Miss. 22 120
v. Pitney, 79 Wash. 608 114, 228
v. Polar Wave Ice & F. Co., 259 Mo. 578 153
v. Porter, 94 Conn. 639 110
v. Portland Nat. Gas. & O. Co., 153 Ind. 483 153
v. Potomac Valley Coal Co., 116 Md. 380 152
v. Potterfield, 47 S. Car. 75 120
v. Powell, 58 Ohio St. 324 116
v. Powers, 124 Tenn. 553 173
v. Poynter, 59 Nebr. 417 143
v. Prudential Coal Co., 130 Tenn. 275 152
v. Public Drug Co., 41 S. Dak. 287 145
v. Public Serv. Commn., 306 Mo. 149 149
v. Public Serv. Commn. (Mo.), 272 S. W. 957 149
v. Pub. Serv. Commn., 77 Wash. 529 160
v. Pulliam, 184 N. Car. 681 116
v. Queen City Fire Ins. Co., 114 Minn. 471 142
v. Ragghianti, 129 Tenn. 560 120
v. Railroad Commn., 60 Wash. 218 149
v. Railroad Commn., 137 Wis. 80 139
v. Ramseyer, 73 N. H. 31 217
v. Rapid Library Assn., 32 S. Dak. 248 145
v. Rauscher, 69 Tenn. 96 106, 120
v. Redmon, 134 Wis. 89 114
v. Reis, 38 Minn. 371 172
State v. Reno Brew. Co., 42 Nev. 397 120
v. Richland, 20 Ohio St. 362 200
v. Riedell, 109 Okla. 35 114
v. Roach, 267 Mo. 300 142
v. Robb, 100 Maine 180 122, 123
v. Roberts, 59 N. H. 256 160
v. Robinson, 35 Nebr. 401 195
v. Rosenberg, 155 Minn. 37 104
v. Ross, 39 N. Dak. 630 120
v. Ross (Wyo.), 228 Pac. 636 88
v. Rowe, 108 Nebr. 232 144
v. Roy, 152 La. 933 90
v. St. Louis, 174 Mo. 125 198
v. St. Louis, 216 Mo. 47 195
v. St. Louis &c. R. Co., 238 Mo. 605 149
v. St. Louis Cotton Compress Co., 147 Ark. 406 142
v. St. Louis S. W. R. Co. (Tex. Civ. App.), 165 S. W. 491 149
v. St. Louis S. W. R. Co. (Tex. Civ. App.), 199 S. W. 829 149
v. St. Paul City R. Co., 117 Minn. 316 160
v. St. Paul City R. Co., 127 Minn. 191 160
v. St. Paul M. &c. R. Co., 98 Minn. 380 149
v. St. Paul R. Co., 122 Minn. 163 160
v. Savage, 96 Ore. 53 115
v. Savings Union Bank & Tr. Co., 186 Cal. 294 91
v. Sayre, 90 Ohio St. 215 195
v. Schlemmer, 42 La. Ann. 1166 123
v. Schlenker, 112 Iowa 642 90, 123
v. Schlitz Brew. Co., 104 Tenn. 715 106
v. Schuman, 36 Ore. 16 115
v. Searcey, 20 Mo. 489 113
v. Security Sav. Bank, 186 Cal. 419 88
v. Seney Co., 134 Md. 437 114
v. Several Parcels of Land, 83 Nebr. 13 89
v. Shapiro, 131 Md. 168 106
v. Shardlow, 43 Minn. 524 149
v. Sheasley, 71 Kans. 857 120
v. Shepard, 177 Mo. 205 87
v. Sherman, 18 Wyo. 169 114
v. Sherow, 87 Kans. 235 118
v. Shorey, 48 Ore. 396 226
v. Shorrock, 55 Wash. 208 128
v. Shroeder, 51 Iowa 197 120
v. Sides, 95 Kans. 633 87
v. Siebert, 123 Mo. 424 195
v. Silva, 21 Idaho 247 104
v. Simons, 2 Speers (S. Car.) 761 88, 116, 121
v. Skeggs, 154 Ala. 249 120
v. Smart, 22 Wyo. 154 116, 120
v. Smith, 158 La. 129 96
v. Smith (R. I.), 93 Atl. 353 104
v. Smith, 42 Wash. 237 214
v. Snow, 117 N. Car. 774 120

[*References are to Sections.*]

State v. Snow, 3 R. I. 64 88, 118
v. Somberg (Nebr.), 204 N. W. 788 116
v. Somerville, 67 Wash. 638 229
v. Sopher, 25 Utah 318 123
v. Southern R. Co., 119 N. Car. 814 116
v. Sponaugle, 45 W. Va. 415 91, 97, 120
v. Standard Oil Co., 194 Mo. 124 142
v. Standard Oil Co., 61 Nebr. 28 153
v. Stephens, 109 Kans. 254 91
v. Stevenson, 164 Wis. 569 171
v. Stewart, 74 Wis. 620 91
v. Stickle, 151 Iowa 303 120
v. Stimpson, 78 Vt. 124 96
v. Stoughton Club, 163 Wis. 362 89, 120
v. Stovall, 103 N. Car. 416 120
v. Stucker, 58 Iowa 496 120
v. Sullivan, 43 Ill. 412 200
v. Suncrest Lumber Co., 186 N. Car. 122 116
v. Superior Court, 42 Wash. 521 171
v. Superior Court, 42 Wash. 660 179, 192
v. Superior Court, 44 Wash. 476 172
v. Superior Court, 47 Wash. 397 180
v. Superior Court, 50 Wash. 13 192
v. Superior Court, 51 Wash. 386 176
v. Superior Court, 52 Wash. 196 193
v. Superior Court, 59 Wash. 621 177
v. Superior Court, 62 Wash. 612 180
v. Superior Court, 67 Wash. 37 148
v. Superior Court, 67 Wash. 355 114
v. Superior Court, 67 Wash. 556 177
v. Superior Court, 68 Wash. 572 180
v. Superior Court, 69 Wash. 189 195
v. Superior Court, 70 Wash. 486 193
v. Superior Court, 71 Wash. 84 193
v. Superior Court, 77 Wash. 585 112
v. Superior Court, 82 Wash. 503 112, 171
v. Superior Court, 83 Wash. 445 180
v. Superior Court, 102 Wash. 331 180
v. Superior Court, 119 Wash. 406 177
v. Superior Court, 127 Wash. 30 112
v. Superior Court, 130 Wash. 661 177
State v. Superior Court, 133 Wash. 308 192
v. Switzler, 143 Mo. 287 196
v. Syndicate Land Co., 142 Iowa 22 145
v. Tachin, 92 N. J. L. 269 128
v. Tallo, 274 S. W. (Mo.) 466 120
v. Tappan, 29 Wis. 664 200
v. Taylor, 33 N. Dak. 76 114
v. Taylor, 119 Tenn. 229 142
v. Teissedre, 30 Kans. 476 120
v. Theodore, 191 S. W. (Mo.) 422 120
v. Thomas, 152 Iowa 500 91
v. Thomas, 278 Mo. 85 180
v. Thompson, 15 Utah 488 87
v. Tibbetts (Okla. Cr.), 205 Pac. 776 114
v. Title Guar. & Sur. Co., 27 Idaho 752 151
v. Toledo, 48 Ohio St. 112 204, 205
v. Tontine Sur. Co., 62 Ohio St. 428 151
v. Topeka, 36 Kans. 76 106
v. Township Trustees, 8 Ohio St. 394 185
v. Tucker, 36 Ore. 291 96
v. Tuggle, 152 La. 747 120
v. Turney, 12 Ohio C. C. R. N. S. 33 128
v. Union Pac. R. Co., 94 Nebr. 556 149
v. United States Exp. Co., 164 Iowa 112 114, 120
v. Urschel, 104 Ohio St. 172 139
v. Vogelsang, 183 Mo. 17 89
v. Walker, 192 Iowa 823 104
v. Wall, 153 Mo. 216 175
v. Walruff, 26 Fed. 178 120
v. Wamsley, 68 W. Va. 103 120
v. Wapello County, 13 Iowa 388 81, 166, 182
v. Ware, 79 Ore. 367 107
v. Watland (N. Dak.), 201 N. W. 680 91
v. Weddington, 188 N. Car. 643 116
v. Weiler, 101 Ohio St. 123 205
v. Weiss, 97 Minn. 125 116
v. Wells, Fargo Co., 38 Nev. 505 89
v. Wertz, 91 W. Va. 622 116
v. Western Union Tel. Co., 111 Minn. 21 142
v. Westfall, 85 Minn. 437 89
v. Weyerhauser, 68 Minn. 353 88
v. Wheatley, 113 Miss. 55 89
v. Wheeler, 25 Conn. 290 82, 84, 118
v. Wheeler, 141 N. Car. 773 108
v. Whisner, 35 Kans. 271 97
v. White Oak R. Co., 65 W. Va. 15 160
v. White River Power Co., 39 Wash. 648 192
v. Whitford, 34 N. Car. 99 104
v. Wiethaupt, 231 Mo. 449 180
v. Wiggin, 64 N. H. 508 107

[*References are to Sections.*]

State v. Williams, 18 N. Ca. 372 104
v. Williams, 146 N. Car. 618 120
v. Williams, 158 N. Car. 610 107
v. Williams, 43 Nev. 290 173
v. Wilson, 61 Kans. 32 152
v. Wisconsin-Minnesota L. & P. Co., 165 Wis. 430 106
v. Wisconsin Tel. Co., 169 Wis. 198 114
v. Withnell, 91 Nebr. 101 229
v. Woodard, 68 W. Va. 66 120
v. Woodfin, 27 N. Car. 199 87
v. Woodson, 41 Mo. 227 116
v. Wurdmann, 183 Mo. App. 28 120
v. Yazoo &c. R. Co., 87 Miss. 679 149
v. York, 74 N. H. 125 235
v. Young, 37 S. Dak. 196 120
v. Ziegenheim, 144 Mo. 283 199
v. Zimmerman (Ill.), 148 N. E. 5 87, 120
v. Zimmerman, 86 Minn. 358 128
v. Zimmerman, 181 Wis. 552 108
State Board of Education v. Mobile & O. R. Co., 72 Miss. 236 149
State Board of Health v. Greenville, 86 Ohio St. 1 114
v. Roy, 22 R. I. 538 88, 91
v. St. Johnsbury, 82 Vt. 276 91
v. Watsonville, 13 Cal. App. 514 128
State Highway Dept. v. Mitchell's Heirs, 142 Tenn. 58 89
State Publ. Util. Commn. v. Chicago &c. R. Co., 275 Ill. 555 90
v. Quincy, 290 Ill. 360 114
v. Toledo, St. L. &c. R. Co., 267 Ill. 93 149
State Railroad Tax Cases, 92 U. S. 575 86, 89
State Sav. & Com. Bank v. Anderson, 165 Cal. 437 97
v. Anderson, 238 U. S. 611 151
State Treasurer v. Auditor General, 46 Mich. 224 142
Stead v. Fortner, 255 Ill. 468 120
Stearns v. Minnesota, 179 U. S. 223 144
Stearns Coal & L. Co. v. Van Winkle, 241 U. S. 670 145
Steele v. Hughes, 104 Ark. 517 139
v. State, 19 Tex. App. 425 120
Stegmaier v. Goeringer, 218 Pa. St. 499 195
Stein v. Mayor of Mobile, 24 Ala. 591 181, 185
Stein's Admr. v. Stein, 32 Ky. L. 664 102
Stein's Estate, In re, 200 App. Div. (N. Y.) 726 87
Stemmler v. Mayor of New York, 179 N. Y. 473 198
Stephen v. Smith, 29 Vt. 160 160
Stephens v. Cherokee Nation, 174 U. S. 445 104
v. Watson, 1 Salk. (1701) 45 120
Stephens Co. v. Myers Park Homes Co., 181 N. Car. 335 171
Sterritt v. Young, 14 Wyo. 146 89, 177
Stettler v. O'Hara, 69 Ore. 519 114, 131, 226
v. O'Hara, 243 U. S. 629 216, 231
Steuart v. Baltimore, 7 Md. 500 89
Stevens v. New York El. R. Co., 8 N. Y. S. 313 112
v. Rutland &c. R. Co., 29 Vt. 545 160
v. State, 2 Ark. 291 90, 118
Stevens County, In re, 36 Minn. 467 144
Stevenson v. Colgan, 91 Cal. 649 199
v. Portland, 82 Ore. 576 207
Stewart v. Board of Supervisors, 30 Iowa 9 165
v. Ertel, 69 Ind. App. 290 87
v. Great Northern R. Co., 65 Minn. 515 170, 180, 194
v. Polk County, 30 Iowa 9 183, 184
Sticker, Ex parte, 109 Fed. 145 88
Stickrod v. Commonwealth, 9 Ky. L. 563 126
Stockton v. Newark, 42 N. J. Eq. 531 115
Stockwell v. State (Tex.), 203 S. W. 109 90
Stoehr v. Wallace, 255 U. S. 239 128
Stoll v. Pacific Coast S. S. Co., 205 Fed. 169 96
Stone v. Farmers Loan & Tr. Co., 116 U. S. 307 125
v. Kendall (Tex. Civ. App.), 268 S. W. 759 114
Stones v. Keeling, 3 Hen. & M. (13 Va.) 228 102
Storrie v. Houston City St. R. Co., 92 Tex. 129 149
Stoughton v. Baker, 4 Mass. 522 160
Stoy v. Indiana Hydr. Power Co., 166 Ind. 316 192
Strandberg v. Stringer, 25 Wash. 358 88
Strange v. Oconto Land Co., 136 Wis. 516 89
Stratford v. Seattle Brew &c. Co., 162 Pac. (Wash.) 31 120
Stratton v. Morris 89 Tenn. 497 106
v. Rice, 66 Colo. 407 87
Stratton, Ex parte, 1 W. Va. 305 116
Straub v. Lyman Land & I. Co., 31 S. Dak. 571 151
Strauder v. West Virginia, 100 U. S. 303 86, 104
Straus v. Conneaut, 23 Ohio Cir. Ct. 320 116
v. Galesburg, 203 Ill. 234 120
Straus, Matter of, 44 App. Div. (N. Y.) 425 198, 199
Strawberry Hill Land Corp. v. Starbuck, 124 Va. 71 114 171

[*References are to Sections.*]

Street v. Lincoln Safe Dep. Co., 254 U. S. 88 120
v. Varney Elec. Supp. Co., 160 Ind. 338 127, 131
Streeter v. Paton, 7 Mich. 341 90
v. People, 69 Ill. 595 120
Stricker, Ex parte, 109 Fed. 145 87
Strickley v. Highland Boy Min. Co., 200 U. S. 527 231
Strom v. Postal Tel. Cable Co., 271 Ill. 544 96
Strong v. Oregon Short Line R. Co., 31 Idaho 48 159
Stroud's Case, Dyer (1572) 313a, 1 Anderson 45 20
Struve v. Droge, 10 Abb. N. C. (N. Y.) 142 128
Stuart v. Palmer, 74 N. Y. 183 88, 124, 169
Stuyvesant v. New York, 7 Cow. (N. Y.) 588 115
Sugarman v. United States, 249 U. S. 182 128
Sukosky v. Philadelphia &c. Coal & Iron Co., 189 App. Div. (N. Y.) 689 142
Sullivan v. Boston &c. R., 210 Mass. 229 149
v. Central Land Co., 173 Ala. 426 145
v. Cline, 33 Ore. 260 171
v. Haug, 82 Mich. 548 91
v. Oregon, R. & Nav. Co., 19 Ore. 319 159
Sully v. American Nat. Bank, 178 U. S. 289 151
Sumida, In re, 177 Cal. 388 116, 123
Sumpter Gas & P. Co. v. Sumpter, 283 Fed. 931 148
Sunderland Bros. Co. v. Chicago, B. &c. R. Co., 104 Nebr. 419 160
Sundstrom, Ex parte, 25 Tex. App. 133 116
Sun Ptg. & Pub. Assn. v. Mayor of New York, 8 App. Div. (N. Y.) 230 184
v. Mayor of New York, 152 N. Y. 257 186, 205
Superior v. Roemer, 154 Wis. 345 149
Superior Laundry Co. v. Rose, 193 Ind. 138 106, 152
Superior Water, L. & P. Co. v. Superior, 174 Wis. 257 204, 205
Supervisors v. Norfolk &c. R. Co., 119 Va. 763 149
Supreme Court Commrs., In re (Nebr.), 160 N. W. 737 91
Surocco v. Geary, 3 Cal. 69 128
Sutherland-Innes Co. v. Evart, 86 Fed. 597 190
Sutter County v. Nichols, 152 Cal. 688 190
Sutton v. New Jersey, 244 U. S. 258 160
v. State, 96 Tenn. 696 106
Sutton's Heirs v. Louisville, 5 Dana (Ky.) 28 169
Suydam v. Moore, 8 Barb. (N. Y.) 358 149, 159
Swallow v. Duncan, 18 Mo. App. 622 151
Swan v. Williams, 2 Mich. 427 165, 180, 183
Swann v. Swann, 21 Fed. 299 116
v. West Virginia, 188 U. S. 739 91
Swanson v. Swanson, 32 Tenn. (2 Swan.) 446 102
Swanton v. Highgate, 81 Vt. 152 201
Sweeney v. Coulter, 109 Ky. 295 90
Sweet v. Hulbert, 51 Barb. (N. Y.) 312 166, 179, 182, 186
v. Rechel, 159 U. S. 380 112, 174, 202, 203
v. Schock, 245 U. S. 192 141
Swift v. Delaware L. &c. R. Co., 66 N. J. Eq. 452 149
Swing v. Brister, 87 Miss. 516 110
Sydnor v. Palmer, 32 Wis. 406 91
Synod of S. Dak. v. State, 2 S. Dak. 366 195

T

Taber v. Erie County, 131 N. Y. 432 200
Tacoma v. Brown, 69 Wash. 538 171
v. Nisqually Power Co., 57 Wash. 420 204
Talbot v. Dent, 9 B. Mon. (Ky.) 526 181, 185
v. Hudson, 16 Gray (Mass.) 417 173
Taliaferro v. United States, 290 Fed. 906 87
Talton v. Mayes, 163 U. S. 382 96
Talvande v. Cripps, 3 McCord. (S. Car.) 147 90
Tampa v. Tampa Water Wks. Co., 45 Fla. 600 90
Tampa Water Wks. Co. v. Tampa, 199 U. S. 241 90
Tang Tun v. Edsell, 223 U. S. 673 90, 91
Tanner v. Albion, 5 Hill (N. Y.) 121 118
v. Alliance, 29 Fed. 196 120
v. Treasury Tunnel, M. & R. Co., 35 Colo. 593 180
Tarkio v. Cook, 120 Mo. 1 118
Tarpey v. McClure, 190 Cal. 593 193
Tarr v. Oregon Short Line R. Co., 14 Idaho 192 91
Tash v. Adams, 10 Cush. (Mass.) 252 195
Tate v. Bell, 4 Yerg. (Tenn.) 202 102
v. Stooltzfoos, 16 Serg. & R. (Pa.) 35 100
Tatham v. Philadelphia, 11 Phila. (C. P.) 276 195
Taylor v. Allen, 151 La. 82 91
v. Crawford, 72 Ohio St. 560 168
v. Drainage Dist. No. 56, 167 Iowa 42 112
v. Nashville &c. R. Co., 46 Tenn. 646 128
v. Newberne, 55 N. Car. 141 181
v. Plymouth, 49 Mass. 462 128
v. Porter, 4 Hill (N. Y.) 140 68, 81, 88, 93, 102, 171

[*References are to Sections.*]

Taylor v. Smith, 124 S. E. (Va.) 259 114
v. Stanly, 15 N. Car. 31 101
v. Thompson, 42 Ill. 8 200
v. Ypsilanti, 105 U. S. 60 184, 185, 186
Taylor, Ex Parte, 68 Fla. 61 88, 151
Taylor, In re, 12 Chicago Leg. N. 17 87
Teel v. Chesapeake &c. R. Co., 204 Fed. 918 91
Teft v. Teft, 3 Mich. 67 104
T. E. Hill Co. v. Cleary, 134 Ill. App. 88 145
Temple v. Riverland Co. (Tex.), 228 S. W. 605 151
Tennessee v. Whiteworth, 22 Fed. 75 144
Tennessee Fertilizer Co. v. McFall, 128 Tenn. 645 88
Tenney v. Lenz, 16 Wis. 566 159
Terrace v. Thompson, 263 U. S. 197 108, 114, 228
Terral v. Burke Const. Co., 252 U. S. 529 145
Terre Haute &c. R. Co. v. Baker, 4 Ind. App. 66 152
Terrett v. Sharon, 34 Conn. 105 200
v. Taylor, 9 Cranch (U. S.) 43 80, 99, 135
Territory v. O'Connor, 5 Dak. 397 123
v. Pinney, 15 N. Mex. 625 108
Terry, In re, 128 U. S. 289 87
Test Oath Cases, 41 Mo. 339 116
Texas & P. Coal Co. v. Lawson, 89 Tex. 394 153
Texas Cent. R. Co. v. Pruitt, 49 Tex. Civ. App. 370 159
Third Nat. Bank v. Divine Gro. Co., 97 Tenn. 603 90
Thoeni v. Dubuque, 115 Iowa 482 110
Thomas v. Bibb, 44 Ala. 721 87
v. Birmingham R. L. & P. Co., 195 Fed. 340 151
v. Gain, 35 Mich. 155 169, 172
v. Kansas City So. R. Co., 277 Fed. 708 107
v. Leland, 24 Wend. (N. Y.) 65 181
v. Mason, 39 W. Va. 526 197
v. Raleigh &c. R. Co., 129 N. Car. 392 96
Thomasson v. Glison, 51 Tenn. 615 128
Thomas Tregor's Case, 8 Edward III (1335) 38b 20
Thome v. Lynch, 269 Fed. 995 91
Thompson v. Central R. & Banking Co., 54 Ga. 509 96
v. Delaware L. &c. R. Co., 41 Pa. Super. Ct. 617 102
v. Floyd, 47 N. Car. 313 87
v. Holton, Fed. Cas. No. 13958 141
v. Meridian Life Ins. Co., 38 S. Dak. 570 142
v. National Mut. B. & L. Assn., 57 W. Va. 551 151
v. New Haven, 100 Conn. 604 89
Thompson v. Nichols, 254 Fed. 973 90
Thompson, Appeal of, 116 Maine 473 91
Thompson's Estate, In re, 204 App. Div. (N. Y.) 182 87
Thornby v. Fleetwood, 10 Mod. (1713) 114, 115 22
Thorndike v. Camden, 82 Maine 39 199
Thorne v. Clarksburg, 88 W. Va. 251 87
Thornton v. Duffy, 254 U. S. 361 159, 199
Thornton, Ex parte, 12 Fed. 538 107
Thorpe v. Rutland &c. R. Co., 27 Vt. 140 117, 149, 161
Thrift v. Town Commrs., 122 N. Car. 31 122
Tiaco v. Forbes, 228 U. S. 549 88
Tidal Oil Co. v. Flanagan, 263 U. S. 444 91
Tide Water Co. v. Coster, 18 N. J. Eq. 518 73, 166, 169
Tiffany, In re, 30 N. Y. S. 494 142
Tilley v. Cox, 119 Ga. 867 89
v. Savannah F. &c. R. Co., 5 Fed. 641 90
Tillman v. Tillman, 84 S. Car. 552 110
Tindall, Ex parte, 102 Okla. 192 114
Tinken v. Stillwagon, 1 City Ct. (N. Y.) 390 114
Tinsley v. Anderson, 171 U. S. 101 89, 90
Title Guar. & Sur. Co. v. Idaho, 240 U. S. 136 88, 90
v. Slinker, 42 Okla. 811 151
Tobias v. Michigan Cent. R. Co., 103 Mich. 330 149
Toledo, W. &c. R. Co. v. Jacksonville, 67 Ill. 37 124, 129, 149, 214
Tolerton & S Co. v. Ferguson, 84 Minn. 497 142
Tomlinson v. Bainaka, 163 Ind. 112 87, 178
v. Board of Equalization, 88 Tenn. 1 89
v. Jessup, 15 Wall. (U. S.) 454 144
Topham v. Interurban St. R. Co., 96 App. Div. (N. Y.) 323 160
Topping Ave., In re, 187 Mo. 146 149
Torres v. Falgoust, 37 La. Ann. 497 112, 124
Towns v. Klamath County, 33 Ore. 225 171
Townsend v. Griffin, 4 Harr. (Del.) 440 104
Townsend, Ex parte, 64 Tex. Cr. 350 114, 120
Tracey v. Ginzberg, 205 U. S. 170 91
Trammell v. Bradley, 37 Ark. 374 120
v. Dinsmore, 102 Fed. 794 90
v. Rome, 142 Ga. 602 118
v. Yancey, 142 Ga. 553 118

[*References are to Sections.*]

Trapp v. Cook Const. Co., 24 Okla. 850 139
Traver v. Merrick Co., 14 Nebr. 327 192
Treadwell v. Beebe, 107 Kans. 31 197
Treat v. White, 181 U. S. 264 108
Treese v. State, 16 Okla. Cr. 682 120
Trego v. Cunningham's Est., 267 Ill. 367 87
Tremont Lumber Co. v. Reagan, 245 U. S. 625 152
Trenton v. Trenton St. R. Co., 72 N. J. L. 317 149
Tripp v. Torrey, 17 R. I. 359 89
v. Yankton, 10 S. Dak. 516 89
Tri-State Amusement Co. v. Forest Park H. A. Co., 192 Mo. 404 151
Troy &c. R. Co. v. Kerr, 17 Barb. (N. Y.) 581 139, 141, 147
Truax v. Corrigan, 257 U. S. 312 97, 109, 110, 224, 234, 235
Trustees of Firemen's Fund v. Roome, 93 N. Y. 313 195, 199
Trustees of Saratoga Springs v. Saratoga Gas &c. Co., 122 App. Div. (N. Y.) 203 91
v. Saratoga Gas &c. Co., 191 N. Y. 123 91
Trustees of University v. Foy, 1 Murphy (N. Car.) 58 79, 80, 87
Tucker v. Aiken, 7 N. H. 113 89
v. Ferguson, 22 Wall. (U. S.) 527 144
Tulare Water Co. v. State Water Commn., 187 Cal. 533 88
Tullis v. Lake Erie &c. R. Co., 175 U. S. 348 96
Tulsa v. Weston, 102 Okla. 222 90
Turlock Irrigation Dist. v. Williams, 76 Cal. 360 176
Turner v. Althaus, 6 Nebr. 54 171
v. Wade, 254 U. S. 64 89
Turner Creamery Co. v. Chicago, M. &c. R. Co., 36 S. Dak. 310 89, 90
Turpin v. Lemon, 187 U. S. 51 89, 94
v. Locket, 6 Call. (Va.) 113 80, 154
Tuthill, In re, 163 N. Y. 133 112, 174
Twin Falls v. Stubbs, 15 Idaho 68 172
Twining v. New Jersey, 211 U. S. 78 2, 8, 86, 88, 95, 96, 97, 110
Twitchell v. Commonwealth, 7 Wall. (U. S.) 321 8
Tyler v. Beacher, 44 Vt. 648 187, 192
v. Defrees, 11 Wall. (U. S.) 331 88
v. Judges, 175 Mass. 71 89, 90
Tyson v. School Directors, 51 Pa. St. 9 200

U

Ughbanks v. Armstrong, 208 U. S. 481 8
Uhlich's Estate v. Chicago, 224 Ill. 402 149
Ullmann Realty Co. v. Tamur, 113 Misc. (N. Y.) 538 114
Ulmer v. First Nat. Bank, 61 Fla. 460 142
v. Lime Rock R. Co., 98 Maine 579 180
Ulrich, Ex parte, 42 Fed. 587 96, 110
Underwood v. Wood, 93 Ky. 177 195
Ungar v. Seaman, 4 Fed. (2d) 80 91
Union Branch R. Co. v. East Tennessee &c. R. Co., 14 Ga. 327 156
Union Bridge Co. v. United States, 204 U. S. 364 149
Union Cemetery Assn. v. Kansas City, 252 Mo. 466 115
Union Cent. Life Ins. Co. v. Chowning, 86 Tex. 654 91
Union Dry Goods Co. v. Georgia Pub. Serv. Corp., 248 U. S. 372 148
Union Fishermen's Co. v. Shoemaker, 98 Ore. 659 114
Union Food Stores, In re, 3 Fed. (2d) 736 139
Union Ice & C. Co. v. Ruston, 135 La. 898 114, 207
Union Imp. Co. v. Commonwealth, 69 Pa. St. 140 144
Union Lime Co. v. Chicago &c. R. Co., 233 U. S. 211 180, 231
Union Nat. Bank v. Blair-Harper Seed Co. (Iowa), 202 N. W. 843 151
v. Chicago, Fed. Cas. No. 14374 107
Union Pac. R. Co. v. Christensen, 275 Fed. 6 142
v. Colorado Postal Tel. Cable Co., 30 Colo. 133 180
v. Lincoln, 97 Nebr. 198 114
v. Mason City &c. R. Co., 199 U. S. 160 139
Union Sawmill Co. v. Felsenthal, 85 Ark. 346 152
Union Steam Pump S. Co. v Secretary of State, 216 Mich. 261 142
Union Stock Yds. Co. v. Nebraska State R. Commn., 103 Nebr. 224 122
Union St. R. Co. v. Saginaw Circ. Judge, 113 Mich. 694 149
Union Sulphur Co. v. Reed, 249 Fed. 172 108
Union Term. Co. v. Turner Const. Co., 247 Fed. 727 107
Union Tract. Co. v. Muncie, 80 Ind. App. 260 145
Union Tr. & Sav. Bank v. Blair-Harper Seed Co. (Iowa), 202 N. W. 839 151
United Fuel Gas Co. v. Public Serv. Commn., 73 W. Va. 571 91
United N. J. R. &c. Co. v. Parker, 75 N. J. L. 771 142
United Railroads v. San Francisco, 249 U. S. 517 205
United Shoe Mach. Co. v. Ramlose, 210 Mo. 631 151
v. Ramlose, 231 Mo. 508 110

[References are to Sections.]

United States v. American Tobacco Co., 221 U. S. 106 153
v. Armstrong, 265 Fed. 683 107
v. Balint, 258 U. S. 250 96
v. Baumgartner, 259 Fed. 722 120
v. Beaty, 232 U. S. 463 87
v. Billings, 190 Fed. 359 107
v. Binder, 253 Fed. 978 128
v. Brewer, 139 U. S. 278 132
v. Burleson, 255 U. S. 407 110
v. Carlisle, 5 App. D. C. 138 191
v. Casey, 247 Fed. 362 128
v. Chandler-Dunbar Water Co., 229 U. S. 53 180, 193
v. Coe, 196 U. S. 635 91
v. Cohen, 268 Fed. 420 114, 120
v. Cohen Grocery Co., 255 U. S. 81 85, 107, 128, 132
v. Cohn, 2 Ind. Terr. 474 120
v. Delaware &c. R. Co., 213 U. S. 366 108
v. Dillin, 168 Fed. 813 90
v. Dunton, 288 Fed. 959 88
v. Dunton, 297 Fed. 447 91
v. E. I. DuPont De Nemours & Co., 188 Fed. 127 153
v. E. I. DuPont De Nemours & Co., 273 Fed. 869 153
v. Engerman, 46 Fed. 176 87
v. Ferreira, 13 How. (U. S.) 48 199
v. Flanders, 112 U. S. 88 198, 199
v. Freund, 290 Fed. 411 120
v. Gettysburg Elec. R. Co., 160 U. S. 668 194
v. Graham, 250 Fed. 499 89
v. Great Lakes Towing Co., 245 U. S. 675 153
v. Hall, 248 Fed. 150 128
v. Hall, 98 U. S. 343 200
v. Heinze, 218 U. S. 532 91, 108
v. Hemet, 156 Fed. 285 91
v. Hing Quong Chow, 53 Fed. 233 91
v. Hom Lim, 214 Fed 456 91
v. Hughes, 299 Fed. 99 90
v. Illinois Cent. R. Co., 263 U. S. 515 90
v. James, 256 Fed. 102 120
v. Jin Fuey, 241 U. S. 394 120
v. Jones, 109 U. S. 513 87
v. Jordan, 113 U. S. 418 199
v. Ju Toy, 198 U. S. 253 88, 91, 96
v. Krafft, 249 Fed. 919 128
v. Lake Shore & M. S. R. Co., 281 Fed. 1007 153
v. Lanza, 260 U. S. 377 120
v. La Vengeance, 3 Dall. (U. S.) 297 87
v. L. Cohen Gro. Co., 255 U. S. 81 229
v. Lee, 106 U. S. 196 97
v. Minery, 259 Fed. 707 120
v. Moore, 129 Fed. 630 97
v. Murphy, 264 Fed. 842 120
v. New England Fish Exch., 292 Fed. 511 153
v. New York, N. H. &c. R. Co., 165 Fed. 742 107
v. Ngum Lun May, 153 Fed. 209 91
v. Oklahoma Gas & Elec. Co., 297 Fed. 575 90
v. One Buick Roadster, 280 Fed. 517 91
v. O'Neill, 198 Fed. 677 177
v. Pacific R. Co., 120 U. S. 227 128, 130
v. Pape, 253 Fed. 370 128
v. Pennsylvania Cent. Coal Co., 256 Fed. 703 130
v. Price, 116 U. S. 43 198, 199
v. Ranier Brew. Co., 259 Fed. 359 120
v. Reading Co., 273 Fed. 848 153
v. Realty Co., 163 U. S. 426 165, 191, 198
v. Reisenweber, 288 Fed. 520 120
v. Russell, 13 Wall. (U. S.) 623 128
v. Sandoval, 231 U. S. 28 120
v. Schulze, 253 Fed. 377 128
v. Scott, Fed. Cas. No. 16, 240b 87
v. Seventy-five Barrels of Vinegar, 192 Fed. 350 90
v. Sing Tuck, 194 U. S. 161 88, 91
v. Smith, 35 Fed. 490 198
v. Standard Brewery, 251 U. S. 210 120, 224, 228
v. Steffens, 100 U. S. 82 8
v. Stowe, 19 Fed. 807 198
v. Tod, 264 U. S. 131 88, 91
v. Union Pac. R. Co., 160 U. S. 1 140, 141
v. United States Steel Corp., 251 U. S. 417 153
v. Williams, 194 U. S. 279 91
v. Wong Dep Ken, 57 Fed. 206 91
v. Wong You, 223 U. S. 67 91
v. Yount, 267 Fed. 861 97, 107
v. Yuginovich, 256 U. S. 462 165
United States Car Co., In re, 60 N. J. Eq. 514 142
United States Cement Co. v. Cooper (Ind. App.), 82 N. E. 981 96
United States Exp. Co. v. Minnesota, 223 U. S. 335 142
United States Fid. & Guar. Co. v. Wickline, 103 Nebr. 21 91
United States Harness Co. v. Graham, 288 Fed. 929 88
United States Smelting &c. Co. v. Utah Power & L. Co., 58 Utah 168 148
University Avenue, In re, 82 Misc. (N. Y.) 598 171
Usher v Colchester, 33 Conn. 567 200
Utley v Clark-Gardner Lode Min. Co., 4 Colo. 369 142

[*References are to Sections.*]

V

Valdosta v. Harris, 156 Ga. 490 89
Valencia County v. Atchison, T. &c. R. Co., 3 N. Mex. 677 89
Valentine v. Canada Life Assur. Co., 106 Ohio St. 273 143
Vallejo &c. R. Co. v. Reed Orchard Co., 169 Cal. 545 87, 180
Valley Center Drainage Dist., In re, 64 Mont. 545 174
Valley Farms Co. v. Westchester, 261 U. S. 155 170
Valley Spring Hog Ranch Co. v. Plagmann, 282 Mo. 1 122
Valparaiso v. Hagen, 153 Ind. 337 172
Van Antwerp, In re, 56 N. Y. 261 169
Vance v. Vandercook Co., 170 U. S. 438 120
Vanceburg &c. Tpk. Rd. Co. v. Chesapeake &c. R. Co., 280 Fed. 482 139, 148
v. Maysville &c. R. Co., 63 S. W. (Ky.) 749 89
Vandalia R. Co. v. Miller, 45 Ind. App. 366 159
v. Walker, 45 Ind. App. 702 159
Vanderbilt v. Adams, 7 Cow. (N. Y.) 349 115
Van Hafften v. Clayton (Mo. App.), 246 S. W. 964 116
Van Horn v. People, 46 Mich. 183 159
Vanhorne v. Dorrance, 2 Dall. (U. S.) 304 80, 81, 88
Van Tuyl v. Sullivan, 217 N. Y. 691 151
Van Winkle v. State, 4 Boyce (Del.) 578 114
Vanzant v. Waddell, 2 Yerg. (10 Tenn.) 93 100, 101
Varden v. Mount, 78 Ky. 86 124
Varick v. New York City, 4 Johns. Ch. (N. Y.) 53 112
v. Smith, 5 Paige (N. Y. Ch.) 137 81, 82, 102
Vaughan v. Furlong, 12 R. I. 127 90
Veazie v. China, 50 Maine 518 200
Venard v. Cross, 8 Kans. 248 188
Venn v. State, 85 Tex. Cr. 151 120
Venner v. American T. & T. Co., 110 Misc. (N. Y.) 118 139
v. Chicago City R. Co., 246 Ill. 170 145
v. Michigan R. Commn., 205 Mich. 573 139
v. New York Cent. R. Co., 158 N. Y. S. 602 153
v. United States Steel Corp., 116 Fed. 1012 139
Verdigris River Land Co. v. Stanfield, 25 Okla. 265 151
Vermilya v. Chicago M. &c. R. Co., 66 Iowa 606 180
Veteran's Welfare Bd. v. Riley, 208 Pac. (Cal.) 678 201
Vetock v. Hufford, 74 W. Va. 785 91
Vetter v. Broadhurst, 100 Nebr. 356 177
Vicksburg v. Vicksburg Water Wks., 202 U. S. 453 157, 160
Vicksburg S. & P. R. Co. v. Forcheimer, 113 Miss. 531 151
v. Railroad Commn., 132 La. 193 149
Victor Chemical Wks. v. State Indus. Bd., 274 Ill. 11 96
Victoria v. Victoria Ice, L. & P. Co., 134 Va. 134 148
Viemeister v. White, 88 App. Div. (N. Y.) 44 128
v. White, 179 N. Y. 235 197
Viemeister, In re, 179 N. Y. 235 218, 233
Vietti v. Mackie Fuel Co., 109 Kans. 179 106
Vigliotti v. Pennsylvania, 258 U. S. 403 120
Villa Park v. Wanderer's Rest Cem. Co., 316 Ill. 226 115
Vincennes v. Citizens Gas Light Co., 132 Ind. 114 122
Vincent v. Ackerman, 155 Mich. 614 178
v. Nantucket, 12 Cush. (Mass.) 103 198
v. Seattle, 115 Wash. 475 91, 106
Vindicator Consol. Gold Min. Co. v. Firstbrook, 36 Colo. 498 96
Vineyard Co. v. District, 42 Nev. 1 90
Violett v. Alexandria, 92 Va. 561 88
Virginia Dev. Co. v. Crozer Iron Co., 90 Va. 126 123
Voglesong v. State, 9 Ind. 112 116
Voight v Detroit, 184 U. S. 115 88, 89
Voightman v. Southern R. Co., 123 Tenn. 452 151
Volpi, Ex parte, 53 Cal. App. 229 120

W

Wabash R. Co. v. Defiance, 167 U. S. 88 112
Wadley So. R. Co. v. Georgia, 235 U. S. 651 90
Wadsworth v. Hinchcliff, 163 App. Div. (N. Y.) 266 87
Waghe Free Inst. v. Philadelphia, 132 Pa. St. 612 144
Wagner v. Leser, 239 U. S. 207 170
Wagner Elec. Mfg. Co. v. Lyndon, 261 U. S. 614 91, 108
v. Lyndon, 262 U. S. 226 8, 87
Waine v. Varley, 6 Dunn & E. (K. B., 1795) 443 21
Walcher v. First Presbyterian Ch., 76 Okla. 9 123
Waldo v. Portland, 33 Conn. 363 200
Waldschmit v. New Braunfels (Tex. Civ. App.), 193 S. W. 1077 128
Wales v. Stetson, 2 Mass. 143 82, 136

[*References are to Sections.*]

Walker v. Carolina Cent. R. Co., 135 N. Car. 738 96
v. Cincinnati, 21 Ohio St. 14 205
v. Sauvinet, 92 U. S. 90 86, 87, 89, 91
v. Shasta Power Co., 160 Fed. 856 193
v. Southwest Mo. R. Co., 198 S. W. (Mo. App.) 441 159
Wall v. Allen, 244 Ill. 456 120
Wall, Ex parte, 107 U. S. 265 87
Wallace v. Adams, 204 U. S. 415 104
v. Myers, 38 Fed. 184 108
v. Richmond, 94 Va. 204 128
v. Winfield, 98 Kans. 651 176
Walls v. Midland Carbon Co., 254 U. S. 300 177, 229
Wally's Heirs v. Kennedy, 2 Yerg. (Tenn.) 554 93, 101, 102
Walston v. Nevin, 128 U. S. 578 80, 169
Walter v. State, 35 Ohio C. C. R. 567 116
Walter A. Wood M. & R. Mach. Co. v. Caldwell, 54 Ind. 270 151
Walters, In re, 84 Hun (N. Y.) 457 128
Walther v. Warner, 25 Mo. 277 180
Wanamaker v. Schuylkill River E. S. R. Co., 244 Pa. 214 172
Ward v. Barnard, 1 Aikens (Vt.) 121 99
v. Board of County Commrs., 253 U. S. 17 144
v. Krinsky, 259 U. S. 503 96, 199, 229
v. Maryland, 12 Wall. (U. S.) 418 107, 165
Ware v. State, 146 Ark. 321 104
Warne v. Varley, 6 Durn & E. (K. B., 1795) 443 21
Warner v. Martin, 21 W. Va. 534 171
Warsaw v. Pavilion Nat. Gas Co., 187 N. Y. S. 350 148
Washington v. Atlantic Coast Line R. Co., 136 Ga. 638 96
v. Fairchild, 224 U. S. 510 90, 141
v. Lasky, Fed. Cas. No. 230 120
v. State, 51 Tex. Cr. 542 104
Washington Ave., In re, 69 Pa. St. 352 165, 166, 169
Washington College v. Duke, 14 Iowa 14 139
Washington Home v. Chicago, 157 Ill. 414 195
Washington, P. &c. R. Co. v. Magruder, 198 Fed. 218 149
Washington University v. Rowse, 42 Mo. 308 144
v. Rouse, 8 Wall. (U. S.) 439 144
Washington Toll Bdge. Co. v. Beaufort County, 81 N. Car. 491 122
Washington Water P. Co. v. Waters, 19 Idaho 595 193
v. Waters, 186 Fed. 572 193
Waterbury v. Central Vermont R. Co., 93 Vt. 461 145
Waterbury v. Chicago, M. &c. R. Co., 207 Ill. App. 375 149
Waterford Elec. L., H. & P. Co. v. State, 117 Misc. (N. Y.) 480 157
Water Front, In re, 190 N. Y. 350 112
Waterhouse v. United States, 159 Fed. 876 91
Waterloo W. Mfg. Co. v. Shanahan, 128 N. Y. 345 180
Water Power Cases, In re, 148 Wis. 124 193
Waters-Pierce Oil Co. v. Texas, 177 U. S. 28 153
v. Texas, 212 U. S. 86 132
Watkins v. Donnell, 192 Mo. App. 640 151
Watson v. Delaware L. &c. R. Co., 32 Misc. (N. Y.) 311 162
v. Maryland, 218 U. S. 173 123
v. Mercer, 8 Pet. (U. S.) 88 82, 84
v. New Milford, 72 Conn. 561 172, 202
v. St. Louis, I. M. &c. R. Co., 169 Fed. 942 107
Watson, In re, 15 Fed. 511 107
Watts v. Ohio Valley Elec. R. Co., 78 W. Va. 144 96
Waud v. Crawford, 160 Iowa 432 90
Waxahachie v. Missouri, K. &c. R. Co. (Tex. Civ. App.), 183 S. W. 61 149
Waye v. Thompson, 152 B. D. (1885) 342 90
Wayzata v. Great Northern R. Co., 50 Minn. 438 119
Webb v. Knox County Trans. Co., 143 Tenn. 423 180, 193
v. Lucas, 125 Minn. 403 173
v. Ritter, 60 W. Va. 193 91
Webber v. Virginia, 103 U. S. 344 114
Weber v. Pend D'Oreille Min. &c. Co., Limited, 35 Idaho 1 151
v. Reinhard, 73 Pa. St. 370 199
Webster v. Fargo, 181 U. S. 394 170
v. Harwinton, 32 Conn. 131 201
v. Susquehanna Pole Line Co., 112 Md. 416 110, 145
Wedesweiler v. Brundage, 297 Ill. 228 106
Weed v. Bergh, 141 Wis. 569 90
Weeds v. United States, 255 U. S. 109 85
Weeks v. Milwaukee, 10 Wis. 242 169, 172, 191
Weems v. United States, 217 U. S. 349 8
Weimer v. Bunbury, 30 Mich. 201 88, 97
Weismer v. Douglas, 64 N. Y. 91 190
Weiss v. Stubblefield, 85 Kans. 199 142
Weister v. Hade, 52 Pa. St. 474 200
Welborne v. Donaldson, 115 Ga. 563 87
Welch v. Coglan, 126 Md. 1 114
v. Cook, 97 U. S. 541 144
v. Swasey, 214 U. S. 91 231

[*References are to Sections.*]

Wellcome v. Leeds, 51 Maine 313 149
Wells v. New York City R. Co., 122 App. Div. (N. Y.) 488 160
Wells Fargo & Co. v. Nevada, 248 U. S. 165 89
Wendel v. Board of Education, 76 N. J. L. 499 195
Werner v. Mohawk Cond. Milk Co., 152 App. Div. (N. Y.) 330 87
West v. Louisiana, 194 U. S. 258 96, 97
v. Whitehead (Tex. Civ. App.), 238 S. W. 976 180
West Chester v. West Chester St. R. Co., 203 Pa. 201 149
West Chicago St. R. Co. v. Illinois, 201 U. S. 506 112
West End &c. R. Co. v. Atlanta St. R. Co., 49 Ga. 151 156
West End Dock v. State (Tex. Civ. App.), 173 S. W. 285 115
Western & A. R. Co. v. Western Union Tel. Co., 138 Ga. 420 112
Western Indemnity Co. v. Pillsbury, 170 Cal. 686 96
Western Pennsylvania R. Co. v. Allegheny, 2 W. N. (Pa. Supp.) 229 169
Western Turf Assn. v. Greenburg, 204 U. S. 359 110, 123, 142
Western Union Tel. Co v. Commercial Mill. Co., 218 U. S. 406 109
v. Frear, 216 Fed. 199 142
v. Hill, 163 Ala. 18 180
v. Indiana, 165 U. S. 304 91
v. James, 162 U. S. 650 127
v. Kansas, 216 U. S. 1 143, 145
v. Mayer, 28 Ohio St. 521 142
v. Myatt, 98 Fed. 335 90
v. Norman, 166 U. S. 717 142
v. Trapp, 186 Fed. 114 89
Westervelt v. Gregg, 12 N. Y. 202 82, 93, 96, 102
West Hartford v. Board of Water Commrs., 44 Conn. 360 204
v. Coleman, 88 Conn. 78 89
v. Hartford, 44 Conn. 360 205
West Jersey &c. R. Co. v. Bridgeton, 64 N. J. L. 189 149
v. Woodbury, 80 N. J. Eq. 412 149
West Point Water P. &c. Co. v. State, 49 Nebr. 218 160
Westport Stone Co. v. Thomas, 175 Ind. 319 180
West River Bdgl. Co. v. Dix, 6 How. (U. S.) 507 102, 180
West Virginia & Md. P. Co. v. Raccoon Valley Coal Co., 93 W. Va. 505 180, 193
West Virginia Trans. Co. v. Volcanic Oil & C. Co., 5 W. Va. 382 180
West Wisconsin R. Co. v. Trempealeau, 35 Wis. 257 144
v. Trempealeau County, 93 U. S. 595 144
Weyerhaueser v. Minnesota, 176 U. S. 550 89
Wheeler v. Contoocook Mills Corp., 77 N. H. 551 96
v. New York, N. H. R. Co., 178 U. S. 321 112
Wheeling v. Natural Gas Co., 74 W. Va. 372 122
Wheeling Bdge. & Term. Co. v. Gilmore, 8 Ohio C. C. R. 658 127
v. Gilmore, 4 Ohio C. D. 366 127
Whelan v. United States, 7 Cranch. (U. S.) 112 87
White v. Charleston, 2 Hill (S. Car.) 571 128
v. Charleston, 98 W. Va. 143 87
v. Findlay, 108 Ohio 475 120
v. Inebriates' Home, 141 N. Y. 123 195, 196
v. Ivey, 34 Ga. 186 128
v. Kendrick, 1 Brev. (S. Car.) 469 80, 87
v. Powers, 89 Wash. 502 110
v. Stamford, 37 Conn. 578 195
v. State, 23 Wyo. 130 96
v. Stout, 72 Wash. 62 177
v. Syracuse &c. R. Co., 14 Barb. (N. Y.) 559 139
v. Thielens, 106 Pa. St. 173 89
v. White, 5 Barb. (N. Y.) 474 81, 82, 88, 102
v. White, 105 Mass. 325 104
White, Ex parte, 82 Tex. Cr. 85 114
White, In re, 100 Misc. (N. Y.) 56 87
Whitehurst v. Coleen, 53 Ill. 247 87
White Sewing-Machine Co. v. Harris, 252 Ill. 361 142
Whitfield v. Hanges, 222 Fed. 745 91
Whiting v. Sheboygan &c. R. Co., 25 Wis. 167 186
Whitley v. State, 134 Ga. 758 120
v. Stephens, 184 Ky. 277 91
Whitman v. Consolidated Gas, E. L. & P. Co., 129 Atl. (Md.) 22 139
Whitmeyer v. Salt Lake &c. R. Co., 46 Utah 491 180
Whitney v. State, 42 Tex. Cr. 283 104
Whittaker v. Salem, 216 Mass. 483 199
Wichita Elec. Co. v. Hinckley (Tex. Civ. App.), 131 S. W. 1192 91
Wichita R. & L. Co. v. Public Util. Commn., 260 U. S. 48 90
Wicomico County Commrs. v. Bancroft, 203 U. S. 112 144
Wight v. Davidson, 181 U. S. 371 170
Wilber v. Reed, 84 Nebr. 767 88
Wilburn v. Raines, 111 Va. 334 112
Wilcox v. Engebretsen, 160 Cal. 288 87
v. Hemming, 58 Wis. 144 90
v. People, 90 Ill. 186 91
Wildes v. Lou Dillon Gold Min. Co., 41 Nev. 364 151

[*References are to Sections.*]

Wiler v. Logan Nat. Gas & F. Co., 27 Ohio C. C. R. 257 89
Wiley v. Parmer, 14 Ala. 627 103
Wilkins v. Jewett, 139 Mass. 29 124
Wilkins, In re, 7 Okla. Cr. 422 87
Wilkinson v. Cheatham, 43 Ga. 258 199
v. Leland, 2 Pet. (U. S.) 627 82, 84, 100
Will, Ex parte, 61 Cal. 121 104
Willard v. Newburyport, 12 Pick. (Mass.) 227 202
v. Presbury, 14 Wall. (U. S.) 676 169
Willcox v. Consolidated Gas Co., 212 U. S. 19 90, 157, 212, 229
William Penn's Case, 6 How. St. Tr. 951 39
Williams v. Arkansas, 217 U. S. 79 123, 222
v. Bailey, 177 N. Car. 37 87
v. Cammack, 27 Miss. 209 169, 175
v. County Supervisors, 21 Fed. 99 89
v. Eggleston, 170 U. S. 304 89
v. Evans, 139 Minn. 32 131
v. Fears, 110 Ga. 584 106
v. Heard, 140 U. S. 529 199
v. Hert, 110 Fed. 166 96
v. McCartan, 212 Fed. 345 107
v. Mississippi, 170 U. S. 213 104
v. Mutual R. F. Life Assn., 145 N. Car. 128 142
v. Nall, 108 Ky. 21 151
v. Port Chester, 72 App. Div. (N. Y.) 505 110
v. Sandles, 93 Ohio St. 92 90
v. School Dist. No. 6, 33 Vt. 271 195
v. State, 179 Ala. 50 120
v. State, 85 Ark. 464 114
v. State, 130 Miss. 827 114, 123
v. State, 52 Tex. Cr. 371 120
v. Walsh, 222 U. S. 415 113
v. Wedding, 165 Ky. 361 173, 174
Willis v. Lafayette-Phoenix Garage Co., 202 Ky. 554 88
Willoughby v. George, 5 Colo. 80 94
Willson v. McDonnell, 265 Fed. 432 107, 132
Wilmerding v. Corbin Banking Co., 126 Ala. 268 88
Wilmington v. Sprunt, 114 N. Car. 310 89
v. Yopp, 71 N. Car. 76 172
Wilmington &c. R. Co. v. Reid, 64 N. Car. 226 144
Wilmington Ry. v. Reid, 13 Wall. (U. S.) 264 144
Wilmington Star Min. Co. v. Fulton, 205 U. S. 60 96
Wilson v. Baltimore &c. R. Co., 5 Del. Ch. 524 112
v. Compton Bond &c. Co., 103 Ark. 452 173
v. Eureka City, 173 U. S. 32 217
v. Isbell, 5 Call. (Va.) 425 81
Wilson v. New, 243 U. S. 332 128, 130, 131, 132, 133, 214
v. North Carolina, 169 U. S. 586 89, 91, 96
v. Pittsburgh &c. R. Co., 222 Pa. 541 180
v. Standefer, 184 U. S. 399 91
v. Supreme Forest W. C., 156 Ga. 403 151
v. United Trac. Co., 72 App. Div. (N. Y.) 233 90, 160
v. United Trac. Co., 76 N. Y. S. 203 148, 149
Wilson, Ex parte, 6 Okla. Cr. 451 120
Wilson-Moline Buggy Co. v. Hawkins, 223 U. S. 713 142
Winchester v. Corinna, 55 Maine 9 200
Windsor v. State, 103 Md. 611 88
Winfree v. Riverside Cotton Mills Co., 113 Va. 717 139
Winkles v. Powell, 173 Ala. 46 104
Winona &c. Land Co. v. Minnesota, 159 U. S. 526 89
Winona &c. R. Co. v. Blake, 94 U. S. 180 90
Winous Point Shooting Club v. Caspersen, 193 U. S. 189 8
Winter v. Muscogee R. Co., 11 Ga. 438 141
Winters v. Myers, 92 Kans. 414 106, 185, 190
Wisconsin Assn. of Master Bakers v. Weigle, 167 Wis. 569 106
Wisconsin Indus. School v. Clark County, 103 Wis. 561 195
Wisconsin Keeley Inst. v. Milwaukee County, 95 Wis. 153 195, 196
Wisconsin, M. &c. R. Co. v. Jacobson, 179 U. S. 287 160
Wisconsin-Minnesota L. & P. Co. v. Railroad Commn., 267 Fed. 711 90
Wisconsin River Imp. Co. v. Pier, 137 Wis. 325 193
Wiseman v. Tanner, 221 Fed. 694 123
Wishmier v. State, 97 Ind. 160 173
Withers v. Buckley, 20 How. (U. S.) 84 8, 84
Withnell v. Ruecking Const. Co., 249 U. S. 63 170
Wold v. Colt Co., 102 Minn. 386 151
Wolf v. Gall, 32 Cal. App. 286 102
v. Lampkin, 198 U. S. 588 90
v. State Bd. of Med. Exam., 109 Minn. 360 88
Wolff Packing Co. v. Court of Indus. Relations, 262 U. S. 522 130, 131, 133, 214
Wong Wing v. United States, 163 U. S. 228 91
Wonner v. Carterville, 142 Mo. App. 120 115
Wood v. Common Council, 56 N. Y. S. 105 149
v. Detroit, 188 Mich. 547 96
v. Whitaker, 81 Fla. 653 120

[*References are to Sections.*]

Wood v. Wood, 70 Okla. 244 87
Wood, In re, 210 U. S. 246 87
Woodall v. Darst, 71 W. Va. 350 199, 200
Woodard v. Killen (Ind.), 148 N. E. 195 91
Woodard, Ex parte, 181 Ala. 97 120
Woodburn v. Public Serv. Commn. (Ore.), 161 Pac. 391 148
Woodlawn Cemetery v. Everett, 118 Mass. 354 115
Woodruff v. Catlin, 54 Conn. 277 149
v. Lobdell, 25 La. Ann. 658 90
v. New York &c. R. Co., 59 Conn. 63 149
Woods v. Cottrell, 55 W. Va. 476 123
v. Prinesville, 19 Ore. 108 120
v. Seattle, 270 Fed. 315 120
Woodson v. State, 69 Ark. 521 142, 152, 154, 155, 159
Woodward v. Blue, 103 N. Car. 109 102
Woodward, In re, 105 Misc. (N. Y.) 446 87
Woodworth v. Rogers, Fed. Cas. No. 18,018 87
Wooley v. Watkins, 2 Idaho 555 116
Worcester v. Norwich &c. R. Co., 109 Mass. 103 149
Worden v. New Bedford, 131 Mass. 23 195
Worth v. Petersburg R. Co., 89 N. Car. 301 144
v. Wilmington &c. R. Co., 89 N. Car. 291 143, 144
Worthington v. District Court, 37 Nev. 212 104
Wright v. Baltimore &c. R. Co., 146 Md. 66 123
v. Barnard, 248 Fed. 756 139
v. Boston, 9 Cush. (Mass.) 233 169, 172
v. Central of Georgia R. Co., 236 U. S. 674 144
v. Cradlebaugh, 3 Nev. 341 110
v. Craig, 202 App. Div. (N. Y.) 684 199
v. Louisville &c. R. Co., 195 U. S. 219 89
v. May, 127 Minn. 150 107
v. Quinn, 238 Mass. 439 171
v. Walcott, 238 Mass. 432 202
v. Wright's Lessee, 2 Md. 429 93, 104
Writs of Assistance, In re, Quincy (Mass.) 512 48
Wrought Iron Bdge. Co. v. Attica, 119 N. Y. 204 198
W. Scheidel Coil Co. v. Rose, 242 Ill. 484 142
Wulzen v. San Francisco, 101 Cal. 15 10, 88
Wurts v. Hoagland, 114 U. S. 606 86, 173, 174
Wyatt v. People, 17 Colo. 252 87
Wyeth v. Thomas, 200 Mass. 474 226
Wynehamer v. People, 13 N. Y. 378 82, 88, 119
Wynne v. Seaboard Air Line R., 96 S. Car. 1 152

Y

Yamasaka, In re, 95 Fed. 652 91
Yamataya v. Fisher, 189 U. S. 86 91
Yaughan v. State, 148 Ga. 517 120
Yazoo &c. R. Co. v. Harrington, 85 Miss. 366 159
v. Scott, 108 Miss. 871 91
Yeatman v. Day, 79 Ky. 186 94
v. Towers, 126 Md. 513 145
Yeaton v. Bank of the Old Dominion, 21 Grat. (Va.) 593 141, 145
Yee Hem v. United States, 268 U. S. 178 90
Yeiser, In re, 110 Nebr. 65 90
Yesler v. Washington Harbor Line Commrs., 146 U. S. 646 229
Yesler Way, In re, 94 Wash. 427 171
Yick Wo v. Hopkins, 118 U. S. 356 86, 105, 108, 109, 125, 222
Young v. Buckingham, 5 Ohio 485 180
v. Colorado (Tex. Civ. App.), 174 S. W. 986 91
v. Dugger, 23 N. Mex. 613 177
v. Red Fork Lev. Dist., 124 Ark. 61 87, 89
v. State Bank, 4 Ind. 301 104
v. Waycross, 11 Ga. App. 846 120
Young, Ex parte, 154 Cal. 317 120
Young, Ex parte, 209 U. S. 123 90
Young Women's Assn., In re, 169 App. Div. (N. Y.) 734 139
Yung Jon, Ex parte, 28 Fed. 308 90

Z

Zabriskie v. Hackensack &c. R. Co., 18 N. J. Eq. 178 139, 141
Zack v. Pennsylvania R. Co., 25 Pa. St. 394 89
Zackheim v. Zackheim, 75 Colo. 161 87
Zakonaite v. Wolf, 226 U. S. 272 91
Zamora, The, L. R. (1916) 2 A. C. 77 25
Zeller v. New Jersey, 231 U. S. 737 98
Zeverly v. Weimer, 5 Ind. Terr. 646 88
Zigler v. Menges, 121 Ind. 99 174
Zimmerman v. Perkiomen &c. Tpk. Co., 81 Pa. 96 157
Zinn v. State, 88 Ark. 273 120
Zircle v. Southern R. Co., 102 Va. 17 180
Zoeller v. Kellogg, 4 Mo. App. 163 124
Zucht v. King (Tex. Civ. App.), 225 S. W. 267 128
v. King, 260 U. S. 174 128
v. School Board (Tex. Civ. App.), 170 S. W. 840 128
Zumhoff v. State, 4 G. Greene (Iowa) 526 120
Zwissig, Ex parte, 42 Nev. 360 120
Zylstra v. Charleston, 1 Bay (S. Car.) 382 80, 87

DUE PROCESS OF LAW

PART ONE.

THE PHRASING OF DUE PROCESS.

CHAPTER I.

PHRASING OF DUE PROCESS IN ENGLAND AND ENGLISH COLONIES.

§ 1. Amid the archaic phraseology of the feudal decrees of Conrad II[1] one finds toward the end of the first canon of the edict of May 28, 1037, a phrase which seems strangely modern, it is there stated that no man shall be deprived of his fief, whether held of the Emperor or of a demi-lord, but by the laws of the Empire and the judgment of his peers.[2] Sixteen states of the United States

1 Conrad II (the Salic) was the strongest of the Holy Roman Emperors during the middle ages. He reigned from 1024 to 1039.

2 William Stubbs, Germany in the Middle Ages (London, 1908), pp. 146, 147.

"*In nomine sancte et individue Trinitatis Chuonradus gratia Dei Romanorum imperator augustus.*

"(1) *Omnibus sancte Dei ecclesie fidelibus et nostris tam presentibus quam et futuris notum esse volumus, quod nos ad reconciliandos animos seniorum et militum, ut adinvicem semper inveniantur concordes et ut fideliter et perseverantер nobis et suis senioribus serviant devote, precipimus et firmiter statuimus: ut nullus miles episcoporum, abbatum, abbatissarum aut marchionum vel comitum vel omnium, qui beneficium de nostris publicis bonis aut de ecclesiarum prediis tenet nunc aut tenuerit vel hactenus iniuste perdidit, tam de nostris maioribus valvasoribus quam et eorum militibus, sine certa et convicta culpa suum beneficium perdat, nisi secundum constitucionem antecessorum nostrorum et iudicium parium suorum.*

have incorporated a literal translation of a portion of this canon in their fundamental law, and fully as many more use phrases of similar import.

Either the legal minds of the continent failed to see the importance of this law or conditions did not develop causing its extended use. At least no evidence has been discovered which would lead us to think it was considered as being especially valuable. It attracted, however, the attention of the English law students of that time, for in the compilation which goes by the name Leges Henrici we find a similar idea expressed.[3] Less than a century later the famous struggle between King John and his barons, which culminated in the granting of Magna Carta at Runnymede, again brought these words to the forefront.[4] The demands of the barons included them,[5] and in the heat of

"(2) *Si contentio emerserit inter seniores et milites, quamvis pares adiudicaverint, illum suo beneficio carere debere, et si ille dixerit, hoc iniuste vel odio factum esse, ipse suum beneficium teneat, donec senior et ille quem culpat cum paribus suis ante nostram presentiam veniant, et ibi causa iuste finiatur.*" *Monumenta Germaniae Historica, Legum Sectio* IV, part I, p. 90.

[3] The words used were: "*Unusquisque per pares suos judicandus est, et ejusdem provinciae.*" William Stubbs, Select Charters of English Constitutional History (Oxford, 1891), p. 126. It has been well established that this code, while issued during the reign of Henry I (about 1118), was merely a legal text-book of law which was English rather than Roman or Canon. However, some continental ideas and passages were incorporated in it, a few of which were from the Lex Salica. Sir Frederick Pollock and Maitland, History of English Law (Cambridge, 1895), Vol. I, pp. 77, 78; J. H. Round, Peerage and Pedigree (London, 1910), Vol. I, pp. 344, 345.

[4] There is some evidence that by this time they had become fairly well fixed in the fabric of English law. A London writer in 1210 is said to have been influential in re-establishing the connection between judgment by peers and the law of the land; a connection which had existed in the Salic Code. Into the Laws of Henry as quoted above, he interpolated the following: "*Quia nil a nullo exigi vel capi debet nisi de jure et natione, per legem terre et justiciam et per judiciam curie.*" F. A. Baker, The Fundamental Law of the Constitution (Washington, 1916), Vol. III, p. 724.

[5] "29. *Ne corpus liberi hominis capiatur, nec imprisonetur, nec dissaisietur, nec utlagetur, nec exuletur, nec aliquo modo destruatur, nec rex eat vel mittat super eum vi, nisi per juditium parium suorum vel per legem terre.*" Articles of the Barons, W. S. McKechnie, Magna Carta (Glasgow, 1905), p. 489. "No free-man's body shall be taken, nor imprisoned, nor disseized, nor outlawed, nor banished, nor in any ways be damaged, nor shall the King send him to prison by force, excepting by judgment of his peers and by the Law of the land." B. C. Barrington, Magna Carta (Philadelphia, 1900),

the controversy, King John not only proposed arbitration, but even went so far as to concede to the barons themselves the right of trial by their peers according to the laws of the kingdom.[6] The classic wording of the thirty-ninth section of Magna Carta[7] follows the wording of the demands of the barons rather than that of the Patent of John, thus not only the nobility, but likewise the freemen, were included in its protection, namely: "No freeman shall be taken and imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers and by the law of the land."[8]

p. 220. These articles were presented April 29, 1215. It is to be noted that the wording of this section differed but slightly from Laws of Henry after the interpolation by the London commentator in 1210. See p. 2, n. 4.

[6] Patent of May 10, 1215, issued by John to conciliate his more moderate enemies, read:

"De libertatibus baronibus Angliae a Rege concedendis.

"Rex omnibus ad quos littere presentes pervenerint, salutem.

"Sciatis nos concessisse baronibus nostris qui contra nos sunt, quod nec eos nec homines suos capiemus nec dissaisiemus, nec super eos per vim vel per arma ibimus, nisi per legem regni nostri, vel per judicium parium suorum in curia nostra, donec consideratio facta fuerit per quatuor quos eligemus ex parte nostra, & per quatuor quos eliget ex parte sua & dominum Papam, qui superior erit super eos; & de hoc securitatem eis faciemus quam poterimus & quam debebimus per barones nostros. Et interim volumus quod episcopi London' Wygorn Cestrens' Roffens' & W. comes Warren eos securos faciant de predictis: & si forte contra aliquod interceptum fuerit, infra competens tempus per predictos octo emendetur.

"Et in Hujus, &c.

"Apud Windesor' x die Maij; anno regni nostri xvii." Thomas Rymer, Foedera (London, 1816-1869), Vol. I, p. 128.

[7] Various numberings of the sections of Magna Carta have been used. Coke and others have followed subsequent modifications of the charter in which the section in question is called "Section 29." This follows the number of the similar section in the Articles of the Barons. It is now quite generally conceded that in the original document as assented to by John this section was numbered thirty-nine, Barrington, Magna Carta, p. 239.

[8] McKechnie, Magna Carta, p. 375. This translation follows the now well-established theory of McKechnie that the original meaning of *"vel"* in the Latin original was not or but and, which of course materially alters the meaning of the chapter. *Ibid.* pp. 381, 382. In all the previous uses of this phrase, the context clearly calls for and, and in a few cases *"et"* is used.

However, practically all the American constitutions follow Coke's translation which renders the word disjunctively. Sir Edward Coke, Institutes of the Laws of England (London, 1628), Vol. II, part I, p. 50. The Latin original read: *"Nulum liber homo capiatur vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum*

§ 2. Magna Carta was not a statute but was merely a personal treaty between King John and the enraged upper classes. Consequently, when Henry III ascended the throne in 1216, the regents of the kingdom re-issued the charter in the name of the boy king. The following year there was another re-issue, and in 1225 Henry III transcribed it, with some alterations, into the final form which Magna Carta was to take.[9] It then became the custom for each successive king to reaffirm the charters at each political crisis during his reign. This practice continued for two centuries and in that period Coke has counted over thirty confirmations.[10]

It is in connection with one of these confirmations (1354) that the phrase "due process of law" probably was first used.[11] The context in which this phrase is found,

ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terre." McKechnie, Magna Carta, p. 375.

[9] McKechnie, Magna Carta, pp. 139-157. These reissues all contained some alterations, but in the main section twenty-nine of the statute of 1225 is the same as section thirty-nine of Magna Carta. "*Nullus liber homo* decetero *capiatur vel imprisonetur aut disseisiatur* de aliquo libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, *aut utlagetur, aut exuletur aut aliquo alio modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terre.*" 1 Statutes of the Realm (London, 1810), pp. 22-25. The words in roman were added by Henry III. McKechnie, Magna Carta, p. 504.

[10] Coke, Institutes, Vol. II, p. 1; Charles Bemont, Chartes des Libertes Anglaises (Paris, 1892), pp. XLVIII-L. The first confirmation came in the reign of Henry III, 1237, and was conceded in return for a grant of a tax of a thirtieth on movables. Stubbs, select Charters, pp. 326, 327. In 1297 Edward issued the famous *Confirmatio Cartarum* which became in a general way the pattern for subsequent confirmations. G. B. Adams and H. M. Stephens, Select Documents of English Constitutional History (N. Y., 1901), pp. 86-88; 1 Statutes of the Realm, p. 123.

[11] "That no man of what estate or condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought to Answer by due Process of the Law." Statute of 28 Edward III (Sometimes called "the Statute of Westminster of the Liberties of London"), ch. iii, 1 Statutes of the Realm, p. 345.

Three years before a similar phrase had been used. "From henceforth none shall be taken by Petition or Suggestion made to our Lord the King or to his Council, unless it be by Indictment or Presentment of his good and lawful People of the same neighborhood, where such Deeds be done, in due Manner, or by Process made by writ original at the Common Law, nor that none be ousted of his Franchises, nor of his Freehold, unless he be duly brought to answer and forejudged of the same by the Course of the law." 25 Edward III Statutes 5, ch. IV (1351). 1 Statutes of the Realm, p. 321.

i. e., the protection against illegal deprivations of liberties, is strikingly similar to section twenty-nine of Magna Carta, as transcribed into the statutes by Henry III. Indeed the natural inference that the phrases "law of the land" and "due process of law" were intended to be synonymous is given additional weight by a direct implication in a statute issued by the same king nine years later.[12] With the authority of Sir Edward Coke behind it,[13] this interpretation has been very generally accepted,[14] and is now the law in the United States.[15]

§ 3. For two centuries after the death of Edward III the minds of Englishmen were turned to dynastic and nationalistic questions. Only incidentally, and that, in but a few instances, were questions of government raised. An evolution was taking place in Parliament, that body prac-

[12] "A Statute concerning Diet and Apparel. . . .

"Item Though that it be contained in the Great Charter, that no Man be taken nor imprisoned, nor put out of his Freehold without Process of Law; Nevertheless divers People make false Suggestions to the King himself, as well for Malice as otherwise, whereof the King is often grieved, and divers of the Realm put in great danger and loss against the Form of the same Charter; wherefore it is ordained, That all they that make such Suggestions, be sent with the same Suggestions before the Chancellor, Treasurer, and his Grand council, and that they there find Surety to pursue their Suggestions, and incur the same Pain that the other should have had if he were attainted, in case that this Suggestion be found evil; and that then Process of the Law be made against them, without being taken and imprisoned against the Form of the said Charter and other Statutes." 37 Edward III (1363), ch. XVIII, 1 Statutes of the Realm, 382.

Five years later (1368) Edward III was petitioned by the House of Commons that presentments before his justices be only made by due process according to the ancient law of the land. This petition was granted "because this article is an article of the Great Charter." L. P. McGhee, Due Process of Law (Northport, 1906), p. 10.

[13] Coke, Institutes, Vol. II, p. 50.

[14] Guthrie has suggested, however, that originally the phrase "law of the land" may have referred to substantive rights, being aimed to secure the perpetuation of "the fundamental principles and axioms of the existing law." "Due process of law," he points out, possibly referred merely to procedure. W. D. Guthrie, Magna Carta and other Essays (N. Y., 1916), pp. 21-23.

[15] Greene v. Briggs, 1 Curtis (U. S., 1852) 311; Murray v. Hoboken Land and Improvement Company, 18 How. (U. S., 1855) 272, 15 L. ed. 372; Davidson v. New Orleans, 96 U. S. (1878) 97, 24 L. ed. 616; French v. Barber Asphalt Paving Company, 181 U. S. (1901) 324, 45 L. ed. 879; Twining v. New Jersey, 211 U. S. (1908) 78, 53 L. ed. 97.

tically doubling in size and holding longer and more frequent sessions.[16] But this occurred so gradually that no great constitutional crises arose. Extraordinary tribunals, such as the Court of the Star Chamber and the Court of High Commission, were created to enable the crown to preserve peace and order more effectively,[17] but men were so engrossed with questions presented by the Reformation and the growth of national self-consciousness, that even the unusual powers wielded by these bodies occasioned but little adverse discussion for some time.[18]

It was not until the stubborn insistence of the Stuarts on the theories of divine right and the royal prerogative forced a discussion of them, that public attention was turned to questions of governmental power. After the rebirth of legal research that resulted from the activity of men like Sir Edward Coke, frequent appeals were made to Magna Carta in the attempts to resist the exercise of arbitrary power.[19] Thus the Petition of Right (1629) drawn up by Coke shortly after the incident of the Five Knights[20] recited section twenty-nine of Magna Carta, as transcribed into the statutes by Henry III, the eighteenth of the statute of 1354, a number of specific grievances resulting from the arbitrary use of royal power,[21] and con-

16 F. A. Ogg, The Governments of Europe (N. Y., 1920), pp. 22, 23.

17 A. V. Dicey, The Privy Council (London, 1887), pp. 94-115.

18 E. P. Cheyney, "The Court of the Star Chamber," American Historical Review, Vol. XVIII (July, 1913), pp. 727-750, at 745, 746. The statute creating the Court of the Star Chamber provided that that body should punish misdoers "as they should and ought to be punished if they were thereof convicted after the due order of the law." 3 Henry VII (1487), ch. I, 2 Statutes of the Realm, p. 509. The avowed purpose of the new tribunal was apparently to convict without "due process of law."

19 Coke's second Institute is a commentary on Magna Charta. See also the "Proceedings in Parliament relating to the Liberty of the Subject," 3 Howell State Trials (1627, 1628), pp. 59-234.

20 Charles I had been carrying on some expensive wars on the continent and in order to continue these he found it necessary to obtain money. An application to Parliament for supplies was refused and he forthwith resorted to a forced loan. Among those who resisted were the "Five Knights" who were thrown into prison by the command of the King. Hannis Taylor, The Origin and Growth of the English Constitution (Boston, 1898), Vol. II, pp. 264, 265.

21 "And where alsoe by the Statute called The great Charter of the

cluded by petitioning that, among other things, "No commissions of like nature may issue forth to any person or persons whatsoever, to be executed as aforesaid, . . . contrary to the laws and franchise of the land."[22] Likewise when the tyrannical procedure in the Court of the Star Chamber was noted it was claimed that Magna Carta and the statutes of 1354 had been violated and therefore the court should be abolished.[23]

Liberties of England, It is declared and enacted, That no Freeman may be taken or imprisoned or be disseised of his Freehold or Liberties or his free Customes or be outlawed or exiled or in any manner destroyed, but by the lawfull Judgment of his Peeres or by the Law of the Land.

"And in the eight and twentith yeere of the raigne of King Edward the third it was declared and enacted by authoritie of Parliament, that no man of what estate or condicion that he be, should be put out of his Land or Tenements nor taken nor imprisoned nor disherited nor put to death without being brought to aunswere by due process of Lawe.

"Neverthelesse against the tenor of the said Statutes and other the good Lawes and Statutes of your Realme to that end provided, divers of your Subjects have of late been imprisoned without any cause shewed: And when for their deliverance they were brought before your Justices by your Majesties Writts of Habeas corpus there to undergoe and receive as the Court should order, and their Keepers commaunded to certifie the causes of their detayner, no cause was certified, but that they were deteined by your Majesties speciall commaund signified by the Lords of your Privie Councell, and yet were returned backe to severall prisons without being charged with any thing to which they might make aunswere according to the Lawe." 3 Charles I (1629), ch. I; 5 Statutes of the Realm, p. 23.

[22] *Ibid.*, Section X.

[23] "Whereas by the Great Charter many times confirmed in Parliament It is Enacted That no Freeman shall be taken or imprisoned or disseised of his Freehold or Liberties or Free Customes or be Outlawed or exiled or otherwise destroyed and that the King will not passe upon him or condemn him but by lawful Judgement of his Peers or by the Law of the Land And by another Statute made in the fifth yeare of the Reigne of King Edward the Third It is Enacted That no Man shall be attached by any accusation nor fore judged of Life or [Lim] nor his Lands Tenements Goods nor Chattels seised into the Kings hands against the forme of the Great Charter and the Law of the Land And by another Statute made in the five and twentieth yeare of the Reigne of the same King Edward the Third It is accorded assented and established That none shall be taken by petition or suggestion made to the King or to his Councell unlesse it be by Indictment or Presentment of good and lawfull People of the same Neighbourhood where such deeds be done in due manner or by Processe made by Writ Originall at the Common Law and that none be put out of his Franchise or Freehold unlesse he bee duly brought in to answer and forejudged of the same by the course of [the] Law and if any thing be done against the same it shall be redressed and holden for none And by another Statute made in the eight and twentieth yeare of the Reigne of the same King Edward the Third It is amongst other things Enacted That no Man of

The documents of this period show that the phraseology of "due process of law" had become fixed as far as English legal development was concerned.[24] Instead of attempting to restate the concept in clearer language the draftsmen of the statutes were content to recite verbatim the venerable words of the Great Charter and the statutes of the fourteenth century.

§ 4. The "rights of Englishmen" in England were given to the colonists in the earliest of the charters for colonization.[25] The same provision was included in the charter of James I to the London Company (1606) under which Jamestown was established May 13, 1607.[26] Under this

what Estate or condition soever he be shall be put out of his Lands or Tenements nor taken nor imprisoned nor disinherited without being brought in to answer by due Processe of Law And by another Statute made in the two and fortieth yeare of the Reigne of the said King Edward the Third It is enacted That no Man be put to answer without presentment before Justices or matter of Record or by due Processe and Writ Originall according to the old Law of the Land and if any thing be done to the contrary it shall be void in Law and holden for errour . . . . .

"Be it likewise declared and Enacted by Authoritie of this present Parliament That neither his Majestie nor his Privie Councell have or ought to have any Jurisdiction power or authority by English Bill Petition Articles Libell or any other arbitrary way whatsoever to examine or drawe into question determine or dispose of the Lands Tenements Hereditaments Goods or Chattels of any of the Subjects of this Kingdome But that the same ought to be tried and determined in the ordinary Courts of Justice and by the ordinary course of the Law." 16 Charles I (1641), ch. X; 5 Statutes of the Realm, p. 110.

[24] The Bill of Rights (December 16, 1689) contains no words comparable to this provision. Adams and Stephens, Select Documents, pp. 462-469. There was some objection to it for this very reason from no less a jurist than Sir Bartholomew Shower. "Reasons for a new Bill of Rights" (1692) in John, Lord Somers, A Collection of Scarce and Valuable Tracts. (London, 1750-1768), Vol. VIII, pp. 64-77.

[25] The Patents of Elizabeth to Gilbert and Raleigh gave all the colonists all the rights of Englishmen. M. A. Hazeltine, "Influence of Magna Carta on the United States," Commemoration Essays, pp. 187, 188.

[26] This charter in its final form was the work of Sir Edward Coke and Sir John Doderidge. William MacDonald, Select Charters and other documents Illustrative of American History, 1606-1775 (N. Y., 1899), pp. 1-11. "It was a provision in the charters to the Virginia settlers, granted by James I, in 1606 and 1609, and in the charter to the colonists of Massachusetts in 1629; of the Province of Maine in 1639; of Connecticut in 1662; of Rhode Island in 1663; of Maryland in 1632; of Carolina in 1663; and of Georgia in 1732; that they and their posterity should enjoy the same rights and liberties which Englishmen were entitled to at home." James

blanket provision the colonists claimed the protection of Magna Carta although no charter issued by the king seems to have contained an express grant of the privileges and rights of that document.[27] On the other hand, among the first statutes of some of the colonies were declarations either that Magna Carta was to be a part of the law of the colony,[28] that the statutes and common law of England were to be a part of the colonial law,[29] or that certain portions of the Great Charter were to be in force.[30] In some instances definite reference was made to the thirty-ninth section of Magna Carta, which in the minds of the colonists, stood out among the liberties granted by that venerable document.

The early colonists were not trained lawyers and the general haziness of their ideas on legal matters is reflected in the wording of their versions of this guarantee. Thus in Massachusetts Bay Colony, the Body of Liberties of 1641 paraphrased this provision of Magna Carta in somewhat popular language,[31] which was subsequently copied

Kent, Commentaries on American Law (Boston, 1884), Vol. II, p. 2, note.

[27] The king vetoed an act passed by the colonial Assembly of Maryland (1638) which provided "That the inhabitants shall have all their rights and liberties according to the great charter of England," because, on the advice of the attorney-general, it was feared it might conflict with the constitution of the colony and the royal prerogative. Hazeltine, "Influence of Magna Carta" (Malden's Essays), pp. 195, 196. Likewise the charter of New York of 1683 was not ratified by the king, perhaps because it contained a statement of the colonial equivalent of "due process of law." C. Z. Lincoln, Constitutional History of New York (Rochester, 1906), Vol. I, p. 101.

[28] As in the case of Maryland, noted above.

[29] As in the case of South Carolina in 1712 and North Carolina in 1715. P. S. Reinsch, English Common Law in the Early American Colonies (Madison, 1899), pp. 407, 408.

[30] Edward Channing, History of the United States (N. Y., 1908), Vol. II, pp. 241, 242; C. M. Andrews, The Colonial Period (N. Y., 1912), pp. 243, 244.

[31] "No mans life shall be taken away, no mans honour or good name shall be stayned, no man's person shall be arrested, restrayned, banished, dismembered, nor in any wayes punished, no man shall be deprived of his wife or children, no mans goods or estaite shall be taken away from him, nor any way indammaged under Coulor of law, or Countenance of Authori-

bodily into the statutes of Connecticut in 1650.[32] The laws of Rhode Island and Delaware, as indeed had been the case in Massachusetts Bay, inferred that statutes made by the general court were the "law of the land."[33] New Haven substituted for "due process of law," "the Scriptures."[34] In general, it is evident that there was little

tie, unlesse it be by vertue of equitie or some expresse law of the Country warranting the same, established by a generall Court and sufficiently published, or in the case of the defect of a law in any particcular case by the word of god." F. J. Stimson, Law of the Constitution (Boston, 1908), p. 75; MacDonald, Select Charters, pp. 73-91. Some twenty years earlier the colony at Plymouth in one of its first official acts declared that "justice should be impartially and promptly administered, with trial by jury, and that no person should suffer in life, limb, liberty, good name, or estate, but by due process of law." C. E. Stevens, The Sources of the Constitution (N. Y., 1894), p. 208.

[32] J. H. Trumbull, ed., The Public Records of the Colony of Connecticut (Hartford, 1850), Vol. I, p. 509. The passage referred to stands as a preface to a "Code of Laws Established by the General Court of Connecticut, May, 1650" (Mr. Ludlow's Code). R. C. Hurd, Writ of Habeas Corpus (Albany, 1858), pp. 706, 707.

[33] ". . . . That no person, in this Colonie, shall be taken or imprisoned, or be disseized of his Lands or Liberties, or be Exiled, or any other otherwise molested or destroyed, but by the Lawfull judgment of his Peeres, or by some known Law, and according to the Letter of it, Ratified and confirmed by the major part of the Generall Assembly lawfully met and orderly managed." Laws established for the Province of Providence by the General Court of Election held at Portsmouth, May 19-21, 1647. J. R. Bartlett, ed., Records of the Colony of Rhode Island (Providence, 1856), Vol. I, p. 157. The passage referred to is in the preamble.

The Charter of 1701 of Delaware gave the legislature plenary power but provided: Section VI. "No Person or Persons shall or may, at any Time hereafter, be obliged to answer any Complaint . . . relating to Property, before the Governor and Council . . . but in ordinary Course of Justice, unless Appeals thereunto shall be hereafter by Law appointed." F. N. Thorpe, The Federal and State Constitutions (Washington, 1909), Vol. I, p. 560.

[34] The powers given to the general court by the new agreement drawn up October 27, 1643, were as follows:

To, "with all care and delligence provide for the maintenance of the purity of religion, . . . so farr as may concerne their civill power to deale therein."

"To mak and repeal lawes, and, while they are in force, to require execution of them in all the severall plantations."

"To heare and determine all causes. . . . In all which, with whatsoever else shall fall within their cognisance or judicature, they shall proceed according to the scriptures." This contract lasted until 1662 when the colony of New Haven was merged with that of Hartford. Thorpe, Constitutions, Vol. I, pp. 528, 529.

improvement over the classical statement of this protection and in some respects the attempts at restatement in these colonial documents resulted in a curtailment of the possible effectiveness of the guarantee, if not in actual confusion.

§ 5. These earlier paraphrases of Magna Carta were superseded by more exact statements in the latter part of the seventeenth century. The New York Charters of Liberty of 1683 and 1691, although they were never ratified by the king, show this tendency toward exactness, the English wording of section thirty-nine being copied almost verbatim.[35] This increasing desire for literalness is most evident in the case of New Jersey. The provision in the Capital Laws of East New Jersey (1675) reflects the ambiguity of the earlier wordings;[36] the agreement

[35] "That noe freeman shall be taken and imprisoned or be disseized of his freehold or liberty or free customs or be outlawed or exiled or any other ways destroyed nor shall be passed upon adjudged or condemned but by the lawful judgment of his peers and by the law of this province. . . . That no man of what estate or condition soever shall be put out of his lands or tenements, nor taken, or imprisoned, nor disherited, nor banished nor any ways destroyed without being brought to answer by due course of law." "The Charter of Libertyes and privileges granted by his Royal Highnesse to the Inhabitants of New York and its Dependencyes." Passed Oct. 30, 1683. The Colonial Laws of New York (Albany, 1894), Vol. I, p. 113. This was vetoed by the King in Council, March 3, 1684, no reason being assigned for the veto. J. R. Brodhead, ed., Documents Relative to the Colonial History of New York (Albany, 1854), Vol. III, pp. 357, 358. "An Act declareing what are the Rights and Privileges of their Majesties Subjects inhabiting within their Province of New York." Passed May 13, 1691. Colonial Laws of New York, Vol. I, p. 246. This was vetoed by the King in Council. One of the reasons assigned for the objections raised by the Lords of Trade to this act was that it "contains also several large and doubtful expressions." Brodhead, Documents Relative to the Colonial History of New York. Vol. IV, pp. 263, 264. Baker, Law of the Constitution, Vol. III, p. 727; C. Z. Lincoln, Constitutional History of New York, Vol. I, p. 102. Stevens states that these provisions were reenacted in 1708 and cites as authority "Laws of New York, 1708," Sources of the Constitution, p. 209, but this is evidently a mistake. There seems to have been no volume of the laws of 1708 published. C. J. Babbitt and C. F. D. Belden, Hand List of Legislative Sessions and Session Laws (Boston, 1912). No such law is found in 1708 in the available editions of the laws of that year. Peter Van Schaack, ed., Laws of New York, 1691-1773 (N. Y., 1774), Vol. I; Colonial Laws of New York, Vol. I; Journal of the Legislative Council of New York, 1691-1743 (Albany, 1861).

[36] "XVIII . . . that no man's life shall be taken away under any

between the proprietors and inhabitants of West New Jersey of the following year approaches the English model a little nearer;[37] the fundamental Constitution of East New Jersey (1683) comes still closer to the wording of Magna Carta;[38] but the English statement is copied almost exactly in 1698.[39] It is important to observe in this connection that the first publication of Magna Carta and the related documents in America probably occurred in 1687 when William Penn brought out an edition of them at Philadelphia.[40]

Less than a century later the colonists revolted from English rule. The Stamp Act Congress (1765) did not refer directly to "due process of law" in either the declaration of rights and grievances addressed to the king, or the memorials sent to Parliament.[41] But the colonists had not forgotten their rights under the Great Charter, for in portions of the declaration of the First Continental Congress (1774) there are obvious references to the thirty-

pretence but by virtue of some law established in this Province, and that it be proved by the mouth of two or three witnesses." Capital Laws of East New Jersey, 1675. Aaron Leaming and Jacob Spicer, Grants and Concessions of New Jersey (2d edition, Somerville, New Jersey, 1881), p. 107.

37 "XVII. That no Proprietor, freeholder or inhabitant of the said Province of West New Jersey, shall be deprived or condemned of life, limb, liberty, estate, property or any ways hurt in his or their privileges, freedoms or franchises, upon any account whatsoever, without a due tryal, and judgment passed by twelve good and lawful men of his neighborhood first had." *Ibid.*, p. 395.

38 "XIX. That no person or persons within the said Province shall be taken and imprisoned, or be devised of his freehold, free custom or liberty, or be outlawed or exiled, or any other way destroyed; nor shall they be condemn'd or judgment pass'd upon them, but by lawful judgment of their peers." *Ibid.*, p. 163.

39 "That no free man to be taken or imprisoned, or be deprived of his freehold, or liberty, or free custom, or outlaw'd or exiled, or any other way destroyed, nor shall be passed upon, adjudged or condemned, but by the lawful judgment of his peers and by the laws of this Province. . . . That no man of what condition or estate soever shall be put out of his lands, tenements, nor taken nor imprisoned, nor disinherited, nor banished, nor anyways destroyed or molested without being first brought to answer by due course of law." Act declaring Rights and Privileges of Subjects of East New Jersey. *Ibid*, pp. 371, 372.

40 Charles Warren, History of the American Bar (Boston, 1911), p. 103.

41 Macdonald, Select Charters, pp. 313-315.

ninth article of that document.[42] The Second Continental Congress (1775), after having been in session a little more than a year, drew up the Declaration of Independence in which there are certain passages which suggest the influence of the Great Charter, even though all direct reference to it is omitted.[43] All of these documents, however, were declarations of grievances rather than declarations of rights, and they each assumed that the rights already existed. For the revolutionary statement of the concept of "due process of law," we must turn to the various declarations of rights drawn up by the colonies in the war constitutions.

[42] "That the inhabitants of the English colonies in North America, by the immutable laws of nature, the principles of the English Constitution, and their several charters or compacts, were entitled to life, liberty, and property; and that they had never ceded to any sovereign power whatever a right to dispose of either, without their consent; that their ancestors, who first settled the colonies, were, at the time of their emigration from the mother-country, entitled to all the rights, liberties, and immunities of free and natural born subjects; and by such emigration they by no means forfeited, surrendered or lost any of those rights; . . . that the respective colonies were entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinity, according to the course of that law; . . . that they were likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws." Stevens, Sources of the Constitution, pp. 210, 211.

[43] "For depriving us in many cases, of the benefits of Trial by Jury: "For transporting us beyond Seas to be tried for pretended offences: "For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

"For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Government:

"For suspending our own Legislature, and declaring themselves invested with Power to legislate for use in all cases whatsoever." Barnes, Federal Code, 1919, p. 4.

CHAPTER II.

DUE PROCESS IN AMERICAN CONSTITUTIONS.

§ 6. Virginia was the first colony to draw up a Bill of Rights although two other colonies had framed constitutions before her.[1] The celebrated Virginia Declaration of Rights was drafted by George Mason[2] and after being adopted by the Convention (June 12, 1776), it was made a part of the first Virginia Constitution.[3] The eighth article contained the "law of the land" provision but presents an innovation in that the terms of the thirty-ninth section of Magna Carta in an abridged form are added as a postscript to an article safeguarding criminal procedure.[4] This protection applies only to "liberty" and was followed in this respect by Vermont;[5] but two other states, in framing their Declaration of Rights during the revolutionary period, considered Mason's terse statement adequate in

[1] Those of New Hampshire and South Carolina were framed earlier. The Virginia Constitution was completed June 29, 1776. G. S. Fisher, The Evolution of the Constitution of the United States (Philadelphia 1910), pp. 70-77; George Bancroft, History of the United States (Boston, 1857-1874), Vol. IX, ch. XV; K. M. Rowland, Life of George Mason (N. Y., 1892), Vol. I, pp. 263, 264.

[2] K. M. Rowland, Life of Mason, Vol. I, pp. 228-250.

[3] N. M. Coleman, The Constitution and Its Framers (Chicago, 1910), pp. 410-414.

[4] "VIII. That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers." Thorpe, Constitutions, Vol. VII, pp. 3812 ff. It appears that this last portion of the article was an afterthought for in one of the earlier drafts it is omitted. K. M. Rowland, Life of Mason, Vol. I, pp. 436-438.

[5] Vermont, ch. I, art. X (Thorpe, Constitutions, Vol. VI, pp. 3733 ff.), framed July 8, 1777.

the main, but made it clear that "life" and "property" were also to be protected.[6] Some of the other states, on the other hand, preferred the venerable statement of Magna Carta as transcribed into the statutes of England by Henry III. The long Declaration of Rights of Maryland, the twenty-first article of which closely followed Magna Carta,[7] became a model in this respect, as in many others, for the constitution of North Carolina.[8] The only other constitution, framed during this period, which contained this provision was that of New York. The wording of the thirteenth paragraph of the New York Constitution represents a compromise between the two tendencies which had developed in that, while as in Virginia, much of the feudal phraseology of Magna Carta was omitted, it is nevertheless, as in Maryland, given an independent place in the constitution.[9]

§ 7. As first adopted, the Federal Constitution contained no article guaranteeing the citizens of the new federal union the rights of "due process of law." In fact it contained only a very few guarantees of the personal rights of citizens in any form[10] and one of the most fre-

6 Pennsylvania, Part I, art. IX (Thorpe, Constitutions, Vol. V, pp. 3035 ff.), framed Sept. 28, 1776; Massachusetts, Part I, art. XII (*Ibid.*, Vol. III, pp. 1888 ff.), framed March, 1780.

7 "That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." Declaration of Rights, art. XXI. Thorpe, Constitutions, Vol. III, p. 1688.

8 Article XII. Thorpe, Constitutions, Vol. V, p. 2789.

9 In the main this constitution was drafted by John Jay. (Thorpe, Constitutions, Vol. V, p. 2626; George Pellew, John Jay (Boston, 1890, pp. 76-88), but section thirteen represents an amendment offered by Gilbert Livingston. Lincoln, Constitutional History of New York, Vol. I, p. 522. The section reads:

"XIII. And this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that no member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to the subjects of this State by this constitution, unless by the law of the land, or the judgment of his peers." Thorpe, Constitutions, Vol. V, p. 2632.

10 Article I, sec. 9, contains several limitations on the federal govern-

quently advanced objections to the document, when its ratification was urged, was the lack of a formal Bill of Rights.[11] Indeed seven of the ratifying states proposed amendments covering this defect.[12] It was to meet this objection that the First Congress, under the leadership of James Madison, passed in 1789 twelve proposals for amendments. Ten of these were ratified by the requisite number of state legislatures by December, 1791.[13]

The wording of the Fifth Amendment, contains the first use of the phrase "due process of law" in an American Constitution.[14] The general arrangement follows the eighth article of the Virginia Declaration of Rights although there are wide differences in content. It reads: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[15] It should be noted that this article deals in general with the subject of criminal procedure and that

ment; art. I, sec. 10, contains a number of limitations on the state governments; and art. IV, contains the federal obligations of the states thus protecting the citizens of every state. Barnes' Federal Code 1919, p. 26.

[11] G. T. Curtis, Constitutional History of the United States (N. Y., 1889), Vol. I, p. 669; E. W. Townsend, Our Constitution (N. Y., 1906), pp. 214, 215.

[12] C. A. Beard, American Government and Politics (N. Y., 1920), pp. 63, 64.

[13] Documentary History of the Constitution (Wash., 1894), Vol. II, pp. 325-390. These events have been recognized by the courts in at least two cases: Jackson v. Wood, 2 Cow. (N. Y., 1824), pp. 819-822; O'Neil v. Vermont, 144 U. S. (1892) 323, 36 L. ed. 450, per Justice Field dissenting, at pp. 361-363.

[14] The phrase had been used in an act of Massachusetts Bay Colony, Oct. 12, 1692. See sec. 33.

[15] Barnes' Federal Code 1919, p. 30.

the phrase "due process of law" comes immediately after the protection against forced self-incrimination. In both of these important respects the article resembles Mason's section, which was, one may almost say, the textual forerunner of the Fifth Amendment.

But although in general arrangement the two sections are comparable, in specific wording they are very different. Mason's section had only protected the citizen against deprivation of his liberty, nothing having been said about life or property, although it was doubtless expected that it would be included in the larger term, "liberty." In the Fifth Amendment, however, we have a reiteration of the three fundamental rights of man in such a manner that the scope of the protection in this regard is perfectly clear.[16] Still more important is the substitution of the terse phrase "due process of law," as used in the statute of 28 Edward III (1363), chapter 18, for the older, more ambiguous, and rather cumbersome wording of Magna Carta. This alteration was an innovation in America, for all the former Declarations of Rights of the revolutionary or colonial period had used the time honored phrase "law of the land" from Magna Carta. The innovation was, however, destined to prevail, for since that time

16 It should be observed that the various provisions of chapter thirty-nine of Magna Carta all deal with one or another of these three fundamental rights and the various changes of wording of that article have been changes of details rather than of substance. Locke considered these three rights as "natural." John Locke, Two Treatises on Civil Government (edited by Henry Morley, London, 1887) Part II, ch. II, pp. 193, 194. The Declaration of Independence alters this trilogy slightly by substituting "life, liberty and the pursuit of happiness" in its place, but the constitutions of Maryland, 1776 (Declaration of Rights, art. XXI), North Carolina, 1776 (Declaration of Rights, art. XII), and Massachusetts, 1780 (Part I, art. X), all use "life, liberty and property." The Northwest Ordinance, 1787, may be looked upon as illustrating a somewhat intermediary step between Mason's wording and that finally adopted. It provided: "No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same." Barnes' Federal Code 1919, p. 19.

the general tendency of American constitutional draftsmen has been, as will be seen,[17] to follow the wording of the Fifth Amendment. This portion of the Fifth Amendment may thus be regarded as containing phraseology of the purest gold mined under the stress of heated constitutional crises, refined by the fire of violent revolutions, proved by the acid test of centuries of struggle, and molded by the hand of one of America's greatest constitutional draftsmen.

§ 8. The Fifth Amendment, however, did not apply to state action but limited solely the federal government.[18] It was probably this fact, together with a desire to protect the loyal citizens in the southern states and the recently freedmen, that led Congress to propose the Fourteenth Amendment:[19] "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any

[17] *Post,* sec. 10.

[18] Murphy v. People, 2 Cow. (N. Y., 1824) 815; Bennett v. Boggs, 1 Baldwin (1830) 60; Fed. Cas. No. 1319; Barron v. Mayor of Baltimore, 7 Pet. (U. S., 1833) 243, 8 L. ed. 672; Fox v. Ohio, 5 How. (U. S., 1846), 410, 434, 12 L. ed. 213; Withers v. Buckley, 20 How. (U. S., 1857) 84, 15 L. ed. 816; Twitchell v. Commonwealth, 7 Wall. (U. S., 1868) 321, 19 L. ed. 223; United States v. Steffens, 100 U. S. (1879) 82, 25 L. ed. 550; Spies v. Illinois, 123 U. S. (1887) 131, 166, 31 L. ed. 80; Brown v. New Jersey, 175 U. S. (1899) 172, 174, 44 L. ed. 119; Chapin v. Fye, 179 U. S. (1900) 127, 45 L. ed. 119; Winous Point Shooting Club v. Caspersen, 193 U. S. (1904) 189, 48 L. ed. 675; Corkran Oil & Development Co. v. Arnaudet, 199 U. S. (1905) 182, 50 L. ed. 143; Jack v. Kansas, 199 U. S. (1905) 372, 50 L. ed. 234; Howard v. Kentucky, 200 U. S. (1906) 164, 50 L. ed. 421; Barrington v. Missouri, 205 U. S. (1907) 483, 51 L. ed. 890; Hunter v. Pittsburgh, 207 U. S. (1907) 161, 52 L. ed. 151; Ughbanks v. Armstrong, 208 U. S. (1908) 481, 52 L. ed. 582; Twining v. New Jersey, 211 U. S. (1908) 78, 53 L. ed. 97; Keller v. United States, 213 U. S. (1908) 138, 53 L. ed. 737; Weems v. United States, 217 U. S. (1910) 349, 54 L. ed. 793; Ensign v. Pennsylvania, 227 U. S. (1913) 592, 57 L. ed. 658; Wagner Electric Mfg. Co. v. Lyndon, 262 U. S. (1923) 226, 232, 67 L. ed. 961.

[19] Joseph Story, Commentaries on the Constitution (edited by M. M. Bigelow, Boston, 1891), ch. XLVII (by T. M. Cooley) sec. 1929, note; H. E. Flack, The Adoption of the Fourteenth Amendment (Baltimore, 1908), pp. 56-59.

law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[20] Three-fourths of the states had ratified this amendment by July, 1868.

The wording of the due process portion of this article is practically identical with the phrases used in the Fifth Amendment, the single exception being that the later article expressly applies only to the states. The context in which the phrase appears, however, is totally different. In the Fifth Amendment it follows immediately after a provision protecting persons accused of crime from arbitrary punishment and precedes the limitation on the use of the power of eminent domain. In the Fourteenth Amendment neither of these restrictions appear. The amendment opens by defining citizenship in the United States, and the second sentence prohibits the abridgment of the privileges of that citizenship by the states. Then, as if to define the greatest of the privileges of citizenship, or at least the one uppermost in the minds of the framers of the section, follows the due process phrase. Furthermore, the phrase is followed by the additional limitation that no one is to be denied the equal protection of the law, evidencing the fact that it was this specific protection of due process that congress had most in mind when the article was framed. The language used, however, is so general that its scope has become very wide and protects not only the negro race but also all citizens of the country.[21]

[20] Barnes' Federal Code 1919, p. 31.

[21] There is considerable evidence that the provision was aimed primarily to protect the negro. W. D. Guthrie, The Fourteenth Amendment (Boston, 1898), pp. 22-25. Santa Clara v. Southern Pacific Railroad Company, 18 Fed. (1883) 385, 399; Slaughter House Cases, 16 Wall. (U. S., 1873) 36, 21 L. ed. 394.

§ 9. Before the adoption of the Fifth Amendment, but eight out of the thirteen states had constitutions containing the equivalent of a due process clause.[22] This represented but little over sixty per cent of the original thirteen states. As new constitutions were adopted and as new states were admitted into the Union the percentage of those writing this protection into their fundamental law steadily increased.[23] It is noteworthy however, that aside from the early rush of states to write this provision into their constitutions, the only period of significant increase was between 1840 and 1880. Indeed, before 1860 nearly eighty per cent of the states had adopted it. This protection had thus secured an increasingly firm hold on American legal life before the unusual circumstances caused by the Civil War. Every one of the new constitutions framed since the close of the Civil War contains this phrase, but there still remain five states (ten per cent) without it in their fundamental law.[24] It might be possible to show that this protection owes its increasing popularity to the rapid growth of new organs of government and to the remarkable increase in the range of governmental power. It would thus appear that a similar desire to protect individual rights evoked this phrase in both the State and Federal Constitutions.

§ 10. Even though it may be too much to say that the Federal Constitution was responsible for the spread of the

[22] These were: Maryland (1776), Declaration of Rights, art. XXI (Thorpe, Constitutions, Vol. III, p. 1688); Pennsylvania (1776), Part I, art. IX (*Ibid.*, Vol. V, pp. 3035-3152); Virginia (1776), Declaration of Rights, art. VIII (*Ibid.*, Vol. VII, pp. 3683-3962); North Carolina (1776) Declaration of Rights, art. XII (*Ibid.*, Vol. V, pp. 2773-2843); New York (1777), art. XIII (*Ibid.*, Vol. V, p. 2632); South Carolina (1778), art. XLI (*Ibid.*, Vol. VI, pp. 3241-3354); Massachusetts (1780), Part I, art. XII (*Ibid.*, Vol. III, pp. 1888-1923); New Hampshire (1784), Part I, art. XV, cl. v (*Ibid.*, Vol. IV, pp 2451-2513).

[23] See Chart I.

[24] The following states do not have either a due process clause or its equivalent in their constitution: Indiana, Kansas, New Jersey, Ohio, Oregon: See Table.

use of "due process of law" in the State Constitutions, the influence of the Federal Constitution upon the wording of the State Constitutions has been very noticeable in this respect. Before 1818 there were but two types of articles containing this phrase. The first was patterned on that in the Virginia Declaration of Rights as Mason had written it. Before 1800 some six other states had followed the example of Virginia and had used the phrase "Law of the Land" in an article the first part of which dealt with criminal procedure.[25] During the period from 1790 to 1860 this type of article was by far the most common one even though after 1800 few states incorporated it into their new fundamental laws.[26]

The second type of article followed very closely the wording of Magna Carta and in the revolutionary constitutions was rather more popular than was the Virginia Article.[27] However, it too was unable to hold its ground,

[25] The wording of the Massachusetts Constitution is fairly typical of this type: "No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially, and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Constitution of 1780, Part I, art. XII (Thorpe, Constitutions, Vol. III, pp. 1888-1923). Other states adopting articles similar to this were: Virginia (1776), Declaration of Rights, art. VIII (*Ibid.*, Vol. VII, pp. 3783-3962); New Hampshire (1784), Part I, art. XV (*Ibid.*, Vol. IV, pp. 2451-2513); Pennsylvania (1776), Part I, art. IX (*Ibid.*, Vol. V, pp. 3035-3152); Vermont (1791), ch. I, sec. 10 (*Ibid.*, Vol. VI, pp. 3733-3781); Delaware (1792), art. I, sec. 7 (*Ibid.*, Vol. I, pp. 568-600); Kentucky (1792), art. XII, par. 10 (*Ibid.*, Vol. III, pp. 1264-1358); Maine (1820) art. I, sec. 6, par. 5 (*Ibid.*, Vol. III, pp. 1646-1668); Missouri (1821) art. XIII, sec. 9 (*Ibid.*, Vol. IV, pp. 2139-2279); Rhode Island (1842) art. I, sec. 10 (*Ibid.*, Vol. VI, pp. 3222-3240). All of these states have retained the same wording, or very similar wording, in their successive Constitutions with the single exception of Missouri which dropped it in 1875. See n. 35, *infra*.

[26] See Chart II, Type I.

[27] The wording in the Tennessee Declaration of Rights of 1796 is typical: "That no freeman shall be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any

and since 1850 no states have written it into their fundamental law unless it had appeared in an earlier constitution of that state. Indeed three states have changed from this wording to another.[28]

New York was the first to use the words "due process of law" in her organic law. The Constitution of 1821 contained, in addition to the time honored words of Magna Carta, an article dealing in general with criminal procedure which concluded by saying that no person shall be deprived of life, liberty or property without "due process of law."[29] Four years before, however, Mississippi had used a phrase which was very similar: "due course of law."[30] This wording, in spite of the fact that it was doubtlessly intended to mean the same thing as a due process clause,[31] did not strike root and except an ingenious attempt of Texas to combine it with the "law of the land,"[32] no state

manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land." Article XI, sec. 8 (Thorpe, Constitutions, Vol. VI, pp. 3414-3473).

[28] See Chart II, Type II. Other states adopting similar articles to that of Tennessee were: Maryland (1776), Declaration of Rights, art. XXI (Thorpe, Constitutions, Vol. III, p. 1688); North Carolina (1776), Declaration of Rights, art. XII (*Ibid.*, Vol. V, pp. 2773-2843); New York (1776), par. XIII (*Ibid.*, Vol. V, p. 2632); South Carolina (1778), art. XLI (*Ibid.*, Vol. VI, pp. 3241-3354); Illinois (1819), art. VIII, sec. 8 (*Ibid.*, Vol. II, pp. 957-1052); Arkansas (1834), art. I, sec. 10 (*Ibid.*, Vol. I, pp. 261-375); Florida (1845) art. I, sec. 8 (*Ibid.*, Vol. II, pp. 664-674). The following states have dropped this wording: Arkansas (1868-1874); South Carolina (1865-1868 and since 1895); Florida (since 1868); Illinois (since 1870).

[29] Article VII, sec. 7 (Thorpe, Constitutions, Vol. V, pp. 2623-2741).

[30] Constitution (1817), art. I, sec. 10, "That in criminal prosecutions, the accused ... cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, but by due course of law." Thorpe, Constitutions, Vol. IV, pp. 2032-2133. The Constitution of Connecticut (1818), art. I, sec. 7 (Benjamin P. Poore, Federal and State Constitutions and Charters (Wash., 1877), Vol. I, pp. 249-269) and Alabama (1819), art. I, sec. 10 (Thorpe, Constitutions, Vol. I, pp. 89-234), contain similar clauses.

[31] In re Dorsey, 7 Porter (Ala., 1838) 293, 329; Dorman v. State, 34 Ala. (1859) 216; Brown v. Levee Commissioners, 50 Miss. (1874) 468; Norwich Water Commissioners v. Palmer, 86 Conn. (1912) 151; Wulzen v. San Francisco, 101 Cal. (1894) 15, 19, 35 Pac. 353; Mason v. Messenger, 17 Iowa (1864) 261, 267.

[32] Constitution of 1845, art. I, sec. 16, "No citizen of this State shall be deprived of life, liberty, property, or privileges, outlawed, exiled, or in any manner disfranchised, except by due course of the law of the

has incorporated it into the fundamental law since 1820. The New York pattern was followed in a considerable number of constitutions adopted between 1850 and 1870. From 1860 to 1890 it was the predominant type.[33]

Since the Civil War a fourth type of wording has proved to be most popular and in the last three decades has outstripped all of its competitors. It marks the complete separation of the wording of "due process of law" from the traditional language of the transcriptions of the thirty-ninth article of Magna Carta. Furthermore, the influence of the Fourteenth Amendment is discernible in that the phrase is not used in connection with the customary protections against arbitrary criminal procedure. The use of the phrase in an independent manner began with the adoption of the West Virginia Constitution of 1873,[34] and rapidly

land." The wording was retained from the Constitution of the Republic of Texas (1836) Declaration of Rights, sec. 7, Thorpe, Constitutions, Vol. VI, pp. 3532-3674. This wording means the same thing as does "due process of law." Mabee v. McDonald, 107 Tex. (1915) 139, 144-146, 175 S. W. 676.

[33] See Chart II, Type III. The original Minnesota (1858) provision is typical of this type: "No person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury, except in cases of impeachment or in cases cognizable by justices of peace, or arising in the army or navy, or in the militia when in actual service in time of war or public danger, and no person for the same offense shall be put twice in jeopardy of punishment, nor shall he be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property without due process of law." Article I, sec. 7, Poore, Constitutions, Vol. I, p. 1029. The following additional states have incorporated this type into their fundamental law: California (1850), art. I, sec. 8 (Thorpe, Constitutions, Vol. I, pp. 391-462); Michigan (1850), art. VI, sec. 32 (*Ibid.*, Vol. IV, pp. 1930-1980); Iowa (1857), art. I, sec. 9 (*Ibid.*, Vol. II, pp. 1118-1159); Nevada (1864) art. I, sec. 8 (*Ibid.*, Vol. IV, pp. 2401-2432); Florida (1868), art. I, sec. 8 (*Ibid.*, Vol. II, pp. 664-764); Arkansas (1868), art. I, sec. 8 (*Ibid.*, Vol. I, pp. 261-375); Wisconsin (as amended, 1870), art. I, sec. 8 (*Ibid.*, Vol. VII, pp. 1359-1617); North Dakota (1889), art. I, sec. 13 (*Ibid.*, Vol. V, p. 2855); Louisiana (1879), Title I, art. 6 (*Ibid.*, Vol. III, pp. 1359-1617); Idaho (1889), art. I, sec. 13 (*Ibid.*, Vol. II, p. 920). Louisiana is the only state once having adopted this form, to abandon it for another. Constitution 1898, Bill of Rights, art. 2; Thorpe, Vol. III, pp. 1359-1617.

[34] The wording of this article is significant. "Private property shall not be taken for public use without just compensation. No person, in time of peace, shall be deprived of life, liberty, or property without due process of law." Article II, sec. 6 (Thorpe, Constitutions, Vol. VII, pp. 4011-4064). The wording in the Oklahoma Constitution of 1907 is rather more typical,

grew in favor, especially in the west and south.[35] The shortness of the wording of this article, together with the importance which judicial interpretation has given it have been factors tending to push it to the foremost part of the Bill of Rights. Frequently it will be found within the first four sections.[36]

§ 11. In one form or another, then, we may say that the protection of "due process of law" is to be found in about as many constitutional documents as any of the other protections of private rights. Even if the Fourteenth Amendment were repealed, but a small portion of the people in the United States would be without this protection as against their state governments.[37] The chief value of

however. "No person shall be deprived of life, liberty, or property, without due process of law." Article II, sec. 7 (*Ibid.*, Vol. VII, p. 4273).

[35] The following additional states have adopted this form: Georgia (1865), art. I, sec. 2 (Thorpe, Constitutions, Vol. II, pp. 764-876); South Carolina (1865), art. IX, sec. 2 (*Ibid.*, Vol. VI, pp. 3241-3354); Mississippi (1868), art. I, sec. 2 (*Ibid.*, Vol. IV, pp. 2032-2133); Illinois (1870), art. II, sec. 2, (*Ibid.*, Vol. II, pp. 957-1052); Missouri (1875), art. II, sec. 30 (*Ibid.*, Vol. IV, pp. 2139-2279); Nebraska (1875), art. I, sec. 3 (*Ibid.*, Vol. IV, p. 2361); Colorado (1876), art. II, sec. 25 (*Ibid.*, Vol. I, p. 477); South Dakota (1889), art. VI, sec. 2 (*Ibid.*, Vol. VI, p. 3370); Montana (1889), art. III, sec. 27 (*Ibid.*, Vol. IV, p. 2304); Washington (1889), art. I, sec. 3 (*Ibid.*, Vol. VII, p. 3973); Wyoming (1889), art. I, sec. 6 (*Ibid.*, Vol. VII, p. 4117); Utah (1895), art. I, sec. 7 (*Ibid.*, Vol. VI, p. 3702); Louisiana (1898), Bill of Rights, art. 2 (*Ibid.*, Vol. III, pp. 1359-1617); Arizona (1912), art. II, sec. 4 (Charles Kettleborough, The State Constitutions, Indianapolis, 1918), p. 56; New Mexico (1912), art. II, sec. 18 (*Ibid.*, p. 939). South Carolina has been the only state to discard this wording after once having adopted it. Even in that state it was reinserted in the constitution framed in 1895. Thorpe, Constitutions, Vol. VI, pp. 3241-3354.

[36] For an exact statement of the wording of this phrase and its position in each state constitution in 1915 see the Index Digest of State Constitutions, prepared by the Legislative Drafting Research Fund of Columbia University (N. Y., 1915), pp. 971-973.

[37] Four out of the five states which have omitted this protection from their fundamental law have incorporated a clause similar to that in the Ohio Constitution: i. e., "All courts shall be open, and every person for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law; and justice administered without denial or delay." Constitution of 1851, art. I, sec. 16 (Thorpe, Constitutions, Vol. V, p. 2915). A similar article occurs in other constitutions. Oregon (1857), art. I, sec. 10 (*Ibid.*, Vol. V, p. 2998); Indiana (1851), art. I, sec. 12 (*Ibid.*, Vol. II, p. 1070). Kansas has a provision of similar import with quite different wording. Constitution of 1859, Bill of Rights, sec. 18 (*Ibid.*, Vol. II,

the Fourteenth Amendment at the present time, therefore, is that it gives the Federal Courts jurisdiction over these cases, thereby insuring a more uniform interpretation of the meaning of this concept. The state provisions, on the other hand, have the value of allowing the state courts to expand the protection of due process and at the same time retaining a minimum of control in the federal courts.[38] The state provisions, it is true, have varied in wording from time to time and from state to state, but regardless of the individual proclivities of the various constitutional draftsmen, and regardless of the peculiar local or national circumstances which may have prompted the various types of wordings found in the different documents, the courts have uniformly declared that these phrases are synonymous.[39] For the unity of this portion of our law in all the states (the diversity of which is proverbial in so many other respects) we are doubtless indebted to the misconception of some unknown draftsman of the statute in the time of Edward II who first identified "due process of law" with the "law of the land." The cross-fertilization of these two ideas made possible a hybrid concept, which under the skilful nurturing of Lord Coke,[40] gathered so much of the sunlight of freedom and the fertility of order that it became withal the simplest and most far-reaching of constitutional phrases.

p. 1243) McGee considers that these give a certain amount of protection to life, liberty, and property and thus cover the ground of due process in an incomplete fashion. Due Process of Law, p. 23, note. See also Durkee v. Janesville, 28 Wis. (1871) 464; Gilchrist v. Schmidling, 12 Kans. (1873) 263 at 271. Many states have provisions prohibiting special legislation which likewise cover part of the ground covered by "due process." Oregon (1857) art. IV, sec. 23 (Thorpe, Constitutions, Vol. V, p. 2999); New Jersey (1844) art. IV, sec. 7, cl. 9, 10, 11 (*Ibid.*, Vol. V, p. 2605).

38 Some have objected that since the state courts are frequently much more conservative than the federal courts they have blocked much legislation of a beneficial nature which the federal courts might have approved. W. F. Dodd, State Government (N. Y., 1922), pp. 141-143. The danger here seems to be overemphasized, however, and is probably outweighed by the advantages of some flexibility in the judicial decisions throughout the country.

39 12 Corpus Juris, 1189 n. 58.

40 Hannis Taylor considers Coke to be a "misleading expounder" of the Great Charter in this respect. While it is hard to be sure that Coke

TABLE.

THE DATES OF ADMISSION OF STATES AND THE ADOPTION OF DUE PROCESS.

State	Year of Admission	Adopted Due Process
Maryland	1787	1776
North Carolina	1787	1776
Pennsylvania	1787	1776
Virginia	1787	1776
New York	1787	1777
South Carolina	1787	1778
Massachusetts	1787	1780
New Hampshire	1787	1784
Delaware	1787	1792
Connecticut	1787	1818[41]
Rhode Island	1787	1842
Georgia	1787	1865
New Jersey	1787	----[42]
Vermont	1791	1791
Kentucky	1792	1792
Tennessee	1796	1796
Ohio	1803	----[43]
Louisiana	1812	1879
Indiana	1816	----[43]
Mississippi	1817	1817
Illinois	1819	1819
Alabama	1819	1819
Maine	1820	1820
Missouri	1821	1821
Arkansas	1836	1836
Michigan	1837	1850
Florida	1845	1845
Texas	1845	1845
Iowa	1846	1857
Wisconsin	1848	1870
California	1850	1850
Minnesota	1858	1858
Oregon	1859	----[43]

was not rather misled than misleading, in that he only reflected the general tendency in the development of this phrase, still all must agree that his influence was tremendous. Hannis Taylor, Due Process of Law (Chicago, 1917), pp. 8-12.

[41] Since 1776 Connecticut has had the following clauses: Paragraph 2 declares that no man's life shall be taken away; good name stained, etc., "Under colour of law, or Countenance of Authority unless clearly warranted by the laws of this State"; paragraph 4 declares that "No Man's Person shall be restrained or imprisoned by any authority whatsoever," unless sentenced by due authority or unless he has failed to produce bail, except in cases of capital crimes or contempt of open court "or in such Cases wherein some express law doth allow of, or order the same." Poore, Constitutions, Vol. I, pp. 249-269.

[42] New Jersey has never had a due process clause.

[43] Ohio, Indiana, Oregon, and Kansas each have clauses somewhat similar to due process clauses. See n. 30, 37, *supra*.

State	Year of Admission	Adopted Due Process
Kansas	1861	---[43, 44]
West Virginia	1863	1863
Nevada	1864	1864
Nebraska	1867	1875
Colorado	1876	1876
North Dakota	1889	1889
South Dakota	1889	1889
Montana	1889	1889
Washington	1889	1889
Idaho	1890	1890
Wyoming	1890	1890
Utah	1896	1896
Oklahoma	1907	1907
New Mexico	1912	1912
Arizona	1912	1912

[44] In one of the many constitutions (Lecompton, 1857) framed in Kansas before that State was admitted into the Union, a due process clause was proposed but it never legally went into effect and was not retained in the constitution as finally adopted. Thorpe, Constitutions, Vol. II, p. 1216 (Bill of Rights, sec. 9).

CHART I

Percentage of States Having Due Process Clause in Constitution

By Decades

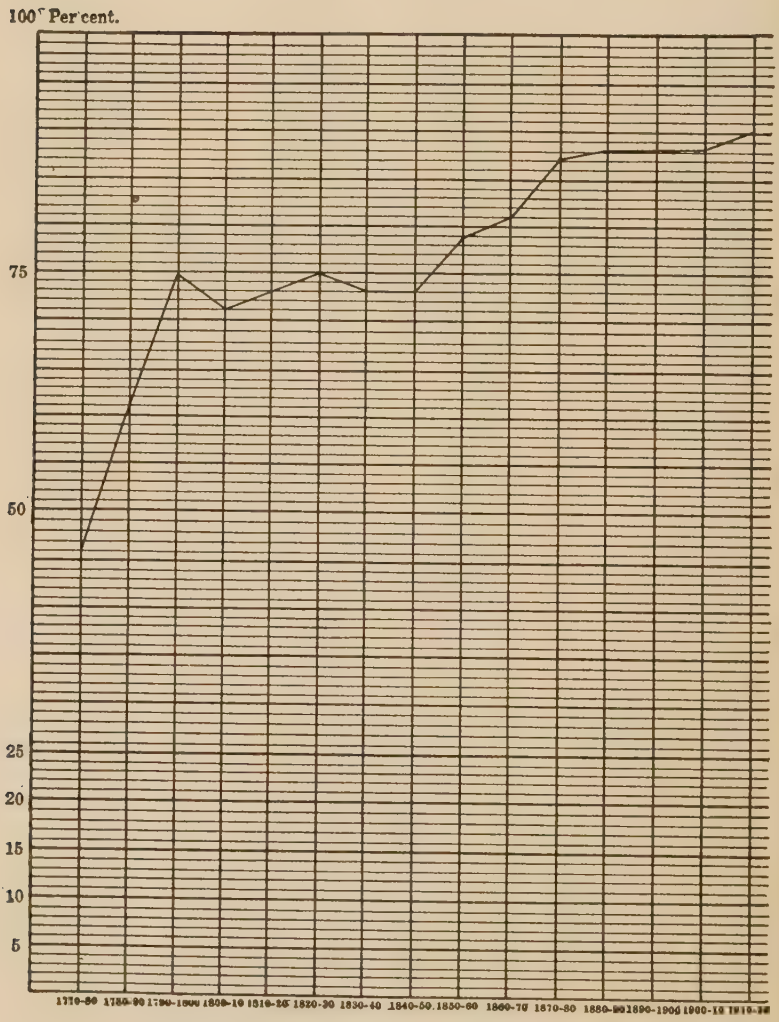


CHART II

Types of Due Process Clauses in State Constitutions

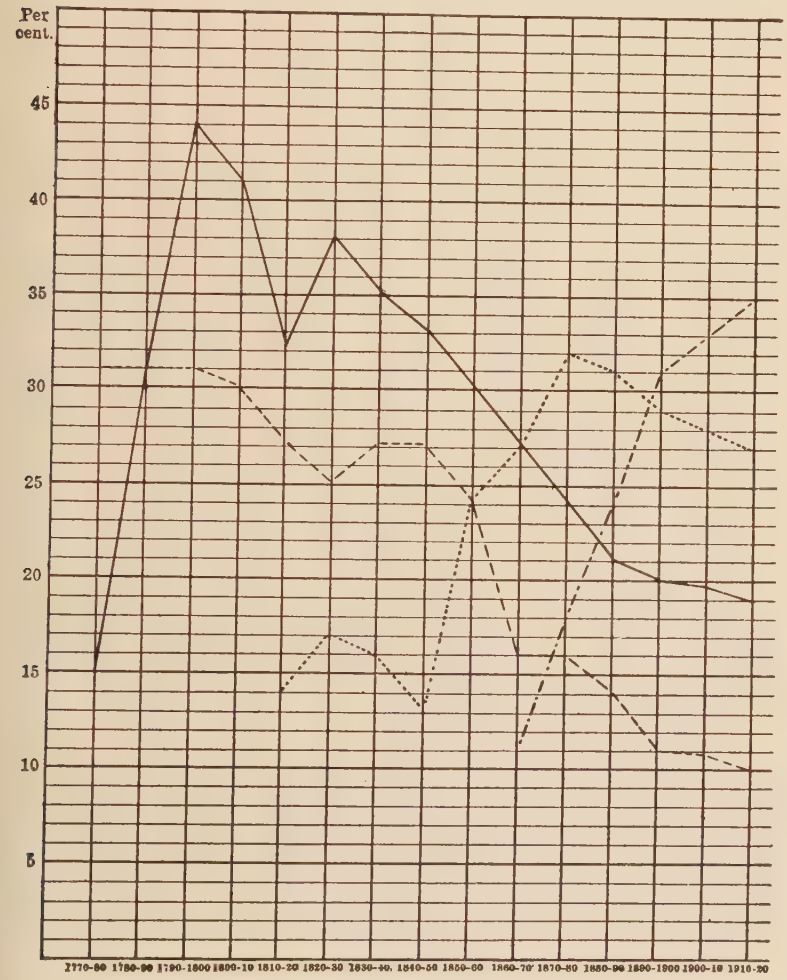
Per cent. by Decades

——— Type I. "Law of the land" in an article dealing with criminal procedure.

– – – – – Type II. "Law of the land" in an independent section.

..... Type III. "Due process" in an article dealing with criminal procedure.

–·–·–·– Type IV. "Due process" in an independent section.



PART TWO.

DUE PROCESS OF LAW IN ENGLAND.

CHAPTER III.

MAGNA CARTA.

§ 12. The difficulties of making an accurate interpretation of Magna Carta are legion. Both the scope and meaning of this document are far from being settled, in spite of the great amount of research which has been done by many of the best historians of both England and the United States. The obscurity of the events leading to the adoption of the charter,[1] the loose character of its wording,[2] and the conspicuous lack of constitutional principles,[3] due probably to the indefinite character of the English constitution in the thirteenth century,[4] contribute to make it well nigh impossible to state just what pro-

[1] For good summaries of these events see: William Stubbs, Constitutional History of England (Oxford, 1896), Vol. I, secs. 151-154; W. S. McKechnie, Magna Carta (Glasgow, 1905), pp. 19-47; C. H. McIlwain, "Due Process of Law in Magna Carta," Columbia Law Review, Vol. XIV (Jan. 1914), pp. 26-52; G. B. Adams, Constitutional History of England (N. Y., 1921), pp. 121-130.

[2] McKechnie, Magna Carta, p. 380.

[3] *Ibid.*, p. 129.

[4] From the first it was recognized that Magna Carta only reflected the English constitution of the time. Both Roger de Wendover and Matthew Paris declared that the demands of the barons were "for the greatest part the ancient laws and customs of the kingdom." Roger de Wendover, Flores Historiarum (edited by H. G. Hewlett, Rolls Series, London, 1887), Vol. 84, part ii, pp. 115, 118, 119; Matthew Paris, Chronica Majora (edited by H. R. Luard, Rolls Series, London, 1874), Vol. 57, part ii, pp. 586, 588, 589.

tection the barons expected each article to give them. This difficulty is perhaps greatest in connection with the most important article of the charter, namely the thirty-ninth.[5] The context of the article gives us practically no aid in its interpretation,[6] and as if purposely to increase the difficulty, the recognized principle of statutory construction that words are to be construed uniformly throughout the statute cannot be followed. Both of the crucial phrases of the article are used in more than one sense elsewhere in the document.[7] If we turn to con-

[5] "Chapter thirty-nine was in 1215 the most important chapter in the charter, as it is today." C. H. McIlwain, "Due Process of Law in Magna Carta." Columbia Law Review, Vol. XIV, p. 41.

[6] Articles 38, 39, and 40 all deal with the administration of justice but each one has evidently no relation to the others. Article 38 provides: "No bailiff for the future shall put any one to his law on his simple affirmation, without credible witnesses brought for this purpose." Article 40 provides: "To no one will we sell, to no one will we deny, or delay right or justice." G. B. Adams and H. M. Stephens, Select Documents of English Constitutional History (N. Y., 1901), p. 47.

[7] "Judgment of his peers" in article 21, evidently refers to judgment in the *Curia Regis* before the whole body of peers, for the previous article (20) in applying to others than the nobles, declared that no one shall be fined, "except by the oaths of honest men of the neighborhood." This view is further strengthened by the use of the phrase in article 52, where it is intimated that the judgment of the twenty-five barons, to whom is intrusted the execution of the charter, shall be the legal judgment of peers. This interpretation, however, cannot possibly be applied to articles 56 and 57 where "legal judgment of their peers" refers to judgment by equals both feudally and racially. In contemporaneous writings this phrase is used to mean any one of three judgments: 1, by full *Curia Regis* instead of a special court; 2, by a full court instead of a special court; 3, by the High Court of Parliament (or the Great Council). Paul Vinogradoff, "Magna Carta, Chapter 39," Commemoration Essays, edited by H. E. Malden (London, 1917), pp. 88-91; J. F. Baldwin, The King's Council in England during the Middle Ages, (Oxford, 1913), p. 68; C. H. McIlwain, The High Court of Parliament and its Supremacy (N. Y., 1910), pp. 24-32.

The phrase "law of the land" is if anything more ambiguous. "Law" in article 38, refers to trial by compurgation. "No bailiff for the future shall put anyone to his law on his simple affirmation, without credible witnesses brought for this purpose." In article 45, "law of the realm" undoubtedly refers to the English common law, especially as exemplified in the codes of Edward the Confessor, Henry I, etc. "We will not make justiciars, constables, sheriffs or bailiffs except of such as know the law of the realm and are well inclined to observe it." In article 56, however, when the English common law is mentioned it is called "the law of England." In article 55, "law" probably is used to refer to the customs observed by the former kings. See McKechnie, Magna Carta, p. 380; McIlwain, "Due Process of Law in Magna Carta," Columbia Law Review, Vol. XIV, pp. 26-51.

temporary legal documents the difficulty is only increased, for not only do we find both of these phrases used in still other senses, but even the little Latin word *"vel"* which connects them is sometimes best translated by "or" and sometimes by "and."[8]

§ 13. As one would expect, in view of the loose, ambiguous wording of this chapter, scarcely any two scholars agree as to the exact way in which it should be interpreted.[9] A careful study of the various theories, however, clearly demonstrates that modern scholarship, while differing in many subsidiary points, is fairly well agreed as to three things. In the first place, there is an undoubted reaction against the older interpretations of this article as the sum-total of all English liberties and a tendency to view it as a specific prohibition aimed at a specific abuse. There can be hardly any doubt that Sir Edward Coke[10] read into this chapter rights which were entirely unwarranted by the events leading to its adop-

[8] G. B. Adams, Origin of the English Constitution (New Haven, 1912), pp. 262-273; F. M. Powicke, *"Per Judicium Parium vel per Legem Terrae"* (in Malden, Commemoration Essays, p. 99); Sir Frederick Pollock and F. W. Maitland, History of English Law Before the Time of Edward I. (Cambridge, 1895), Vol. I, p. 152, note 2.

[9] Note especially the interpretations of the following: John Reeves, History of English Law (London, 1787), Vol. I, p. 241; Stubbs, Constitutional History Vol. I, p. 577; H. A. Lesser, History of the Jury System (Rochester, 1894), p. 103-170; J. B. Thayer, Development of Trial by Jury (Part I of a Preliminary Treatise on Evidence at the Common Law) (Boston, 1896), pp. 56-65; Pollock and Maitland, History of English Law, Vol. I, p. 152, note 2; L. O. Pike, Constitutional History of the House of Lords (London, 1894), ch. X; Adams, Origin of the English Constitution, pp. 262-274; McKechnie, Magna Carta, pp. 376-395; Richard Tomson, An Historical Essay on the Magna Carta of King John (London, 1829), p. 223; Paul Vinogradoff, "Magna Carta Chapter 39" (in Malden, Commemoration Essays, pp. 78-95); F. M. Powicke, *"Per Judicium Parium"* (In Malden, Commemoration Essays, pp. 96-121); McIlwain, High Court of Parliament, pp. 54-60; Sir Edward Creasy, Rise and Progress of the English Constitution (N. Y., 1856), pp. 187-202; L. W. Vernon-Harcourt, His Grace the Steward and the Trial of Peers (London, 1907), pp. 220-224; T. F. T. Plucknett, Statutes and their Interpretation in the First Half of the Fourteenth Century (Cambridge, 1922), pp. 150, 151.

[10] Institutes of the Laws of England (London, 1628), Vol. II, pp. 50 ff.

tion. It is also probable that he and others[11] exaggerated it and tended to make its provisions much too broad.[12] The particular abuse which the section aims to curb is that of execution before judgment,[13] and one writer has gone so far as to claim that because of the specific nature of the article and the events leading to its adoption, it was expected that its protection would extend no further than to the baronial classes.[14] This viewpoint has been questioned by Professor McIlwain and directly denied by Professor Powicke,[15] who maintains that the primary thing the barons wanted in this chapter was to curb injustice in a general sort of way.[16] It would naturally follow from this position that, inasmuch as the barons were not trained lawyers, historians, or scholars, the wording of the section had little meaning for them outside the fact that they were determined that the king should be curbed in his arbitrary actions and that justice should be done.

In the second place, it is generally recognized that the word *"vel,"* which joins the phrases "judgment of his peers" and "law of the land" in the Latin, should be

[11] Especially Thomson, Essays on Magna Carta, pp. 220-229.

[12] Vinogradoff, "Magna Carta Chapter 39" (Malden, Commemoration Essays, p. 376); Edward Jenks, "The Myth of Magna Charta," Independent Review, Vol. IV (Nov. 1904), pp. 260-273; G. H. Blakesley, "Manorial Jurisdiction," Law Quarterly Review, Vol. V (April, 1889), pp. 113-131 at p. 125; Pike, Constitutional History of the House of Lords, pp. 169-171. It is still regarded as one of the most important articles in the document. Adams, Origin of the English Constitution, p. 242.

[13] "Its object was to prohibit John from resorting to what is sometimes whimsically known in Scotland as 'Jettart justice.' The same grim tradition applied to Lidford as to Jedburgh:

"I oft have herd of Lydford law,
How in the morn they hang and draw,
And sit in judgment after."

McKechnie, Magna Carta, p. 376.

[14] Adams, Origin of the English Constitution, pp. 268-273.

[15] McIlwain, "Due Process in Magna Carta," Columbia Law Review, Vol. XIV, pp. 32-51; Powicke, *"Per Judicium Parium"* (Malden, Commemoration Essays, pp. 96-121).

[16] Powicke, *"Per Judicium Parium"* (Malden, Commemoration Essays, pp. 120, 121).

translated "and" rather than "or" as it was formerly rendered.[17] However, it does not follow that the conjunctive quality of the word is as strong as to mean "and also,"[18] but rather that the two ideas are complementary to each other, i. e., if justice could not be done in one way, it must be done by the other.[19]

In the third place, the "law of the land" is now quite generally regarded as having been synonymous in this connection with "legality." Some scholars[20] look upon it as having the wide significance of the general principles of justice and legality, while others would limit the meaning to the technical laws of England as exemplified by the common law and pre-existing statutes.[21] In view of the facts that the procedure at common law was as yet in a very fluid state and that the barons were not lawyers, it seems very doubtful if they were thinking of any special form of procedure. Likewise only a very limited number of uses of "*per legem terrae*" in its technical sense have

[17] McKechnie, Magna Carta, pp. 381, 382; Pike, Constitutional History of the House of Lords, p. 170; Adams, Origin of the English Constitution, pp. 262-264; Rudolph Gneist, History of the English Constitution (translated by P. A. Ashworth, New York, 1886), Vol. I, p. 302.

On the other hand, it should be noted that Mr. Vernon-Harcourt has termed the translation of "*vel*" by "and" as "the acme of absurdity." L. W. Vernon-Harcourt, His Grace the Steward and Trial of Peers, p. 244.

[18] Pollock and Maitland translate "*vel*" as meaning both "and" and "or" in this regard. History of English Law, Vol. I, p. 152, note. See also the discussion by Powicke, "*Judicium Parium*" (Malden, Commemoration Essays, p. 99).

[19] McKechnie, Magna Carta, p. 381, note 3. Powicke puts it tersely thus: "One would expect the King to mean that, without stating exactly the scope of the law of the realm, he would observe it: it might include a judgment of peers or it might not; if the circumstances were peculiar—owing, for example, to the importance of the offender or the difficulty of the case—the judgment would not be arbitrary. The defendant's peers could be or would be called upon to see that justice was done." "*Judicium Parium*" (Malden, Commemoration Essays, p. 99).

[20] Harcourt, His Grace the Steward and Trial of Peers, pp. 220 ff; Adams, Origin of the English Constitution, pp. 242-244; W. D. Guthrie, Magna Carta and Other Essays (N. Y., 1916), pp. 21-23.

[21] "The expression 'per legem terrae' simply required judicial proceedings, according to the nature of the case; the duel, ordeal, or compurgation in criminal cases, the duel, witnesses, charters, or recognition in property cases." M. M. Bigelow, History of Procedure (Boston, 1880), p. 155, n.

been discovered in other legal writings of the time,[22] while its use in the broader sense of general legality is quite common.[23] There is furthermore evidence that the

[22] Less than a half a dozen instances of such use have been found in the elaborate research which has been carried on in this field. McKechnie, Magna Carta, pp. 379, 380. Glanville uses the words twice in the technical sense (Book II, ch. 19; Book V, ch. 5), but in neither of these places is the context such that it calls for *"per legem terrae"* and thus they may be compared to the use of *"les"* in Magna Carta ch. 38. In another place, however, he uses *"per legem terrae"* in the nontechnical sense, making it, apparently, the equivalent of "law and custom of the Realm" in its general meaning. "A debt of the first description arises when one person entrusts another with any such thing as consists in number, or weight, or measure. When one person so entrusts another, if he should receive back more than he lent, he commits usury; and if he die in such crime, he shall by the law of the land, be punished as a usurer, of which, indeed, we have spoken more fully in the preceding pages." (Ranulph de Glanville, A Treatise on the Laws and Customs of the Kingdom of England. Composed in the Time of King Henry the Second (*circa* 1187) (translated by John Beames, Esquire, published with Introduction by J. H. Beale, Jr., Washington, 1900), Book 10, ch. 3, pp. 199, 200.

"Law and custom of the Realm" is likewise used by Glanville both technically (Book 7, ch. 12) and generally (Book 7, ch. 15), Pollock and Maitland, History of English Law, Vol. I, p. 111.

[23] Powicke, *"Judicium Parium"* (Malden, Commemoration Essays, pp. 100, 101). The canons of Conrad II (William Stubbs, Germany in the Middle Ages (London, 1908) pp. 146, 147), suggests the broader interpretation as does the provision in the *"Leges Quatuor Burgorum"* of David II of Scotland. 1 Acts of Parliament of Scotland (London, 1844), p. 22. It is noteworthy that in the Patent of May 10, 1215, issued by King John in an effort to conciliate his more moderate enemies it is made quite clear that the king was ready to grant procedure according to the laws of the realm or according to the judgment of peers in his court (*"vel per judicium parium suorum in curia nostra"*). This apparently did not satisfy the barons and in Magna Carta this part is copied with the one significant change that the words *"curia nostra"* are omitted, suggesting that the barons wanted more than mere procedure according to a legal form. The barons probably looked upon the laws of Henry I as giving them procedure according to the "law of the land." "The antecedents of the charter seem, then, to show pretty conclusively that the demand of chapter 39, was for a restoration of the 'good laws' of an earlier time, and that these good laws cannot be compressed into the narrow mold of the ancient forms of judicial proof." McIlwain, "Due Process of Law in Magna Carta," Columbia Law Review, Vol. XIV, p. 51. At the council of St. Alban's (Aug. 4, 1213), the justiciar laid before the whole body "the king's recent promise of good government, he issued an edict forbidding the legal exactions, and referred to the laws of Henry I as the standard of the good customs which were to be restored." The death of the justiciar shortly after the adjournment of the Council and the subsequent failure of John to live up to these promises precipitated the crises at Runnymede. Stubbs, Constitutional History, Vol. I, sec. 154. Certainly a reversion to the principles of the laws of Henry I would have done much to have prevented the consolidation of the opposition to John.

Pope, who was in close touch with the situation in England at this time, understood the demands of the barons to be of the more general nature.[24] It may thus be concluded that, even though the barons did use a phrase which in technical use referred merely to common-law procedure, what they wished to secure was justice and legality in all of the king's actions affecting private right. To secure this they undoubtedly looked to the procedure which was then considered as regular and to the customs of the realm,[25] with particular reference to the "good old days" of Henry I.[26]

§ 14. The wording of Magna Carta is such that the protection of the thirty-ninth article applies only to freemen. Scarcely had the document been granted when the question of the scope of this protection arose,[27] and a little over a century later, Edward III, with a breadth

[24] Thomas Rymer, Foedera, Conventions, Letters, and Public Acts (London, 1739), Vol. I, p. 136. Vinogradoff puts this point thus: "It shows conclusively that a contemporary potentate, thoroughly conversant with the subject in dispute and fully able to express his thoughts in a definite manner, understood the 'lex terrae' in the broad and ordinary sense of the 'laws and customs of the realm.' It would be inadvisable for us to dissent from this authoritative interpretation." "Magna Carta Chapter 39" (Malden, Commemoration Essays, pp. 84, 85). The same viewpoint of Innocent III is voiced in a letter which he wrote to the barons urging the payment of scutage. "In order that your king's plans may not be interfered with by such action, we earnestly admonish and exhort you, and by this letter we command you to pay promptly and without further resistance or objection the said scutage in accordance with your obligation. For without judicial procedure he cannot be despoiled of this scutage because his ancestors and he have been accustomed to receive it." J. P. Minge, Patriologiæ Cursus Completus (Petit-Montsonge, 1855), Vol. CCXVII, col. 248.

[25] Powicke, *"Per Judicium Parium"* (Malden, Commemoration Essays, p. 100).

[26] Vinogradoff's summary is especially apt in this regard: "The struggle was waged to secure trial in properly constituted courts of justice and in accordance with established law. The latter requirement would apply equally to substantive rules as far as they existed, and to procedure; it was in fact a declaration in favour of legality all round." "Magna Carta Chapter 39" (Malden, Commemoration Essays, p. 85).

[27] Vinogradoff, "Magna Carta Chapter 39" (Malden, Commemoration Essays, pp. 80, 81). Knights seem to have been the class most interested in this section at first. Plucknett, Statutes and their Interpretation, p. 150.

of vision characteristic of the "English Justinian," settled the controversy by the enactment of two statutes. In the first of these the word "man" was substituted for "freeman,"[28] but some twenty years later, in the very statute in which the phrase "due process of law" first appeared, the possibility that the former substitution was a mere clerical error was definitely precluded by declaring that this protection should apply to every "man of what estate or condition that he be."[29] Certain of the American states before the Civil War limited the operation of this protection to "freemen" but the Thirteenth and Fourteenth Amendments make such limitations inoperative at the present time even where they are retained.[30]

§ 15. The great problem of the years following the granting of the charter was not so much the extension of its protection as the securing of the protection already promised. The barons had already had experience with the faithlessness of John,[31] and to prevent him from repudiating his promises when the crisis was past, they proposed that a self-perpetuating oligarchy of barons antagonistic to him be empowered to enforce the charter.[32] These provisions proved exceedingly unsatisfactory and after Henry III ascended the throne the reissues of the charter omitted them.[33] In fact, the numerous reissues of the charters without the enforcement provisions were efforts of Henry, who probably never loyally

[28] 5 Edward III, c. 9; I Statutes of the Realm (London, 1810), p. 267.

[29] 28 Edward III, c. 3. "That no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law." 1 Statutes of the Realm, p. 345. See also Vinogradoff, "Magna Carta Chapter 39" (Malden, Commemoration Essays, p. 82).

[30] Maryland, in the Constitution adopted in 1864, made the change from "freeman" to "man" with the express purpose of extending the protection to the black race. Debates of the Constitutional Convention, Maryland, 1864 (Annapolis, 1864), Vol. I, pp. 235-239.

[31] McKechnie, Magna Carta, pp. 27-36.

[32] Magna Carta, c. 61; McKechnie, Magna Carta, pp. 468-477.

[33] McKechnie, Magna Carta, p. 142.

accepted the settlement they contained, to redefine the limitations on the royal power in order to strengthen his government.[34] Repeated violations of the spirit, if not of the letter, of Magna Carta led to the calling of the "Parliament of Oxford,"[35] but the clumsy machinery set up by this body was merely that of Magna Carta with certain added defects. It very shortly proved unequal to the task before it.[36] In spite of the increasing frequency of its meetings, the Commune Concilium was a body totally unsuited to the task of producing a responsible government in England—a representative Parliament was needed.[37] It remained for Edward I, a monarch with a national viewpoint and a vision of representative government, to develop such an institution.[38]

Organs of government, however, were so crudely organized in the Middle Ages that one would not expect entire reliance upon them for the enforcement of an important body of liberties like Magna Carta. The religious temper of the time is reflected in an additional sanction which was given to Magna Carta by the pronouncement of excommunication upon all who violated that document.[39] Indeed during the reign of Edward I this

[34] McKechnie, Magna Carta, pp. 139-157.

[35] J. R. Green, History of England (N. Y., 1900), Vol. I, p. 299.

[36] McKechnie, Magna Carta, pp. 190, 191. For the "Provisions of Oxford" see Adams and Stephens, Select Documents, pp. 56-62.

[37] McKechnie, Magna Carta, pp. 162-164.

[38] His reason for calling Parliament together is tersely summed up in his famous *dictum* taken from Justinian: "What affects all by all must be approved." Writ of Summons to the Model Parliament, 1295. E. P. Cheyney, University of Pennsylvania Translations and Reprints (Philadelphia, 1910), Vol. VI, p. 33.

[39] In 1253 Boniface, Archbishop of Canterbury, imposed the sentence: "We excommunicate, accurse, and from the benefits of our Holy Mother the Church .... All those that by any craft or wyliness do violate, break, diminish, or change the Church's Liberties and free Customs, contained in the Charters of common Liberties and of the Forest, granted by our Lord the King, to Archbishops, Bishops, and other Prelates of England; and likewise to the Earls, Barons, Knights, and other Freeholders of the Realm: And all that secretly, or openly by Deed, Word, or Counsel, do make Statutes, or observe them being made, and that bring in Customs, or keep them when they be brought in, against the said Liberties, or any of

pronouncement became a regular ceremony at each session of Parliament, and the curse came to be so worded that it would fall, not only on those who invaded the rights of the church under the charter, but likewise those who violated any of its provisions.[40]

§ 16. But even in the days when religious sanctions had relatively great force, this threat of excommunication did not prevent frequent violations of the charters. Confirmatio Cartarum had expressly provided that the courts were to give judgments according to the charters,[41] and occasionally an alleged violator was hailed before them.[42]

them, the Writers, Law makers, Counsellors, and the Executors of them, and all those that shall presume to judge against them. All and every which Persons before mentioned, that wittingly shall commit anything of the Premises, let them well know that they incur the foresaid sentence. *Ipso Facto,* i. upon the deed done." 1 Statutes of the Realm, p. 6.

[40] *Confirmatio Cartarum* provided that such sentences shall be twice a year proclaimed in order that all may become familiar with the penalty of breaking the venerable document. 25 Edward I (1297) ch. 4; 1 Statutes of the Realm, p. 123. Robert, Archbishop of Canterbury pronounced the following sentence at the time of the issuing of *Confirmatio Cartarum:* "We therefore enjoyn all Persons, of Estate soever they be, that they and every of them, as much as in them is, shall uphold and maintain these Articles granted by our Sovereign Lord the King in all points; and all those that in any point do resist or break, or in any manner hereafter procure counsel, or in any wise assent to resist or break those Ordinances, or go about it, by word or deed, openly or privily by any manner of pretence or colour, We the foresaid Archbishop, by our Authority in this writing expressed, do excommunicate and accurse, and from the Body of our Lord Jesus Christ and from all the Company of Heaven, and from all the Sacraments of Holy Church do sequester and exclude. So be it." 1 Statutes of the Realm, p. 126.

This curse was by no means an empty form. The solemnity of the ceremony was probably aimed partly to impress the knights of the shire recently arrived at Westminster for the Parliament. Rishanger relates that immediately after the curse had been pronounced in 1300, Parliament voted the king a tax of a twentieth on moveables, and immediately after the ceremony in 1301, they voted a fifteenth. Willelmi Rishanger, Chronica Monasterii St. Albani (edited by H. T. Riley in Rolls Series, number 28, London, 1865), part II, pp. 404-408, 460-462.

[41] "And we will, that if any judgment be given from henceforth contrary to the points of the charters aforesaid by the justices, or by any other our ministers that hold plea before them against the points of the charters, it shall be undone and holden for nought." (1297) 1 Statutes of the Realm, p. 123; Adams and Stephens, Select Documents, p. 86.

[42] In 1321 fines were imposed upon sheriffs in London for amercing persons without the affeerment of their peers. It was declared that such procedure was against Magna Carta and "is beyond royal power and con-

The deposition of Richard II, although not made by a regular court, was in the nature of such a judgment and one of the articles against him affirmed that he had committed perjury since he had not kept the thirty-ninth article of the Great Charter.[43]

A large proportion of the cases in which the mediaeval courts of England were forced to consider Magna Carta were cases of seizin of land, fines, forfeitures, or outlawry. In a number of cases the king was forced to make restitution or alter his course of procedure because it was shown to the court that the provisions of Magna Carta applied. Thus an attempt to give by summary proceedings what was in reality justice in the particular case, was found invalid since it was not according to the "law of the land."[44] Bracton makes it clear that the judges should render justice according to the form of law established

trary to all justice." *Liber Custumarum* (Book of Customs in Guild-hall, London, edited by H. T. Riley, Rolls Series, number 12, London, 1860), Vol. II, p. 410.

Certain of the barons protested that the exortions of 1310, were against the form of the Great Charter, *Ibid.*, p. 110.

[43] "Although it was enacted and ordained, and is hitherto confirmed, that no freeman shall be taken, nor anyway destroyed; and that the king shall not pass, nor send any to pass upon him, but by the lawful judgment of his peers, or by the laws of the land: yet by the will, command and order of the said king, very many of his liege people being maliciously accused for having publicly or secretly said something that might tend to the dispraise, scandal, or disgrace of the person of the said king, have been taken and imprisoned and brought before the constable and marshall of England in the court military, in which court the said liege people being accused would not be admitted to make any other answer than that they were no way guilty, and would justify the same, and defend themselves by their bodies and not otherwise; notwithstanding their appellors were young men, stout and lusty, and those so accused, ancient and impotent, maimed or infirm; whereby not only destruction of the lords and grandees of the kingdom, but also of all and singular persons of the commonalty of the same may probably ensue; since therefore the said king hath wilfully acted contrary to such a statute of this kingdom, tis not to be doubted but he hath incurred the crime of perjury." Articles against Richard II (1399), art. XXVII. William Cobbett, Parliamentary History of England (London, 1806), Vol. I, col. 262.

[44] Case of Eustace de Stuteville (1324). The king admitted his mistake and after Eustace had paid a fine of 1,000 pounds, he was reinstated in possession pending the decision of the matter according to the regular forms of law, i. e., assize mort d' ancestor. Henry de Bracton, Notebook (edited by F. W. Maitland, 1887), Vol. III, pp. 123-125, case 1106.

by the charter even though it may cause inconvenience.[45] Especially in the case of outlawry is the "law of the land and the custom of the realm" insisted upon.[46] This rule was in accordance with the decision in the case of Hubert de Burgh and Gilbert Basset in 1324, in which the decrees of outlawry were reversed because the proceedings in the shire courts had not been according to "lex terrae."[47] Sir John Fortescue, writing at a time when the governmental machine of mediaeval England had crystallized into shape (1470) declared the fact that no one should lose either his life or property without a regular trial before the courts according to the law of the land to be one of the more important advantages of the English system of government.[48] On the other hand, opposed to these frequent appeals to Magna Carta which had established this principle,[49] the personal power of the king was frequently

[45] "Nor are those, who have been found culpable, to be dismissed upon sureties, without a special precept from the king, an inquest having been first held whether they have been accused through enmity or spite, or by a true accuser. And a writ for making such an inquest ought to be granted gratuitously, according to what is to be seen in the Charter of Liberties." Henry de Bracton, *De Legibus et Consuetudinibus Angliae* (edited by Sir Travers Twiss, Rolls Series, number 70, London, 1879), Book II, Treatise II "of the Crown," ch. 5, sec. 3 (Vol. II, p. 283). "Likewise the writ abates, if it has been sued out contrary to the right and custom of the realm, and especially contrary to the charter of liberty, as the writ which is called *Praecipe incapite*, through which a free person may lose his court." Book V, Treatise V, "Exceptions," ch. XVII, sec. 2 (Vol. VI, p. 271).

[46] An outlawry not made according to the law of the land does not forfeit the outlawed person's goods to the crown, and the courts should see that the widow of the outlaw gets her dower. *Ibid.*, Book IV, Treatise VI "Action for Dower," ch. XIV, sec. 13 (Vol. IV, p. 567).

[47] Bracton's *Notebook*, Vol. II, pp. 664-667, case 857; Vol. II, p. 85, case 85; Bracton, *De Legibus et Consuetudinibus Angliae*, Book III, Treatise II "The Crown," ch. VII, secs. 6, 7 (Vol. II, pp. 327-331); Book III, Treatise II, ch. IV, sec. 12 (Vol. II, p. 313).

[48] "A King of England cannot, at his pleasure, make any alterations in the laws of the land, for the nature of his government is not only regal but political.... He can neither make any alteration, or change in laws of the realm without the consent of the subject, nor burthen them, against their wills, with strange impositions." Sir John Fortescue, *De Laudibus Legum Angliae* (translated by Francis Grigor, London, 1917), ch. 9, p. 17; W. A. Dunning, Political Theories from Luther to Montesquieu (N. Y., 1905), pp. 204, 205. Curiously Fortescue makes no mention of Magna Carta. His work was probably written about 1470. *Ibid.*, p. 201.

[49] "In John de la Lee's case it formed the basis of the defendant's

no small factor and his command was in some cases given the weight of law. The monarchy was far from limited although certain limitations were rapidly gaining strength.[50]

§ 17. Magna Carta was making itself felt in English law not only in the matter of legal procedure but also as a norm by which subsequent statutes might be measured. Indeed the question may be very fairly raised whether the law of the land was not quite as much a protection against legislative power as against executive power throughout its history. It is true that it was invoked more frequently in regard to executive matters than legislative matters if one is to look at the matter superficially. But it must be remembered that in mediaeval as well as in primitive communities the modern distinction between executive and legislative functions of government had not developed, that ordinances were often confused with statutes, and that the royal power was of both sorts. In fact a close study of the instances in which this phase was called into use gives no warrant for assuming that it was not quite as much the legislative aspects of the king's power as the executive that needed to be curbed. The growth of the power of parliament and its gradual absorption of the function of legislation evoked clearer

claim. In the quashing of Thomas of Lancaster's sentence, and in the proceedings as to Maltravers' pardon, royal officers, and even the peers of Parliament were charged with flagrant breaches of the rule of law, safeguarding the right of free Englishmen to a fair trial." In fact, Edward I in 1300 appointed justices to hear and determine complaints of transgressions against the Great Charter. Vinogradoff, "Magna Carta Chapter 39" (Malden, Commemoration Essays, p. 94), and cases there cited.

50 "There was a powerful doctrine which ran counter to the consistent application of clause 39 of Magna Carta, namely, the exceptional power assigned to the King in virtue of his prerogative as sovereign ruler of the Commonwealth.... Thomas of Lancaster was condemned to death without trial because Edward II had personally recorded the notorious fact of his treason. The personal command of the King is often recognized by judges to outweigh purely legal considerations. In the procedure of replevin as applied to accused persons, it was taken for granted that an arbitrary arrest might be justified by the personal order of the King." Vinogradoff, "Magna Carta Chapter 39" (Malden, Commemoration Essays, p. 94).

intimations that due process of law by that time at least, had clear legislative import. When the author of the Mirrour of Justices[51] deplored the fact that "the great Charter of Liberties is damnably disregarded by the governors of the law and by subsequent statutes, which are contrary to some of these articles," he had in mind not only the failure of some of the justices to live up to the common-law procedure[52] but likewise certain substantive limitations of due process of law upon legislation.[53] Granting, as Mr. Maitland has pointed out,[54] that the author of this work was probably producing a political romance rather than a serious legal commentary, we must give him credit nevertheless for expressing for the first

[51] A law book of unknown origin (probably written by Andrew Horn, a young chamberlain of London about 1290) which protests against the abuses of the justices disclosed by the scandal of 1289. F. W. Maitland, "Introduction to the Mirrour of Justices," pp. xlviii-lii, Mirrour of Justices (edited for the Selden Society by W. J. Whitaker, London, 1895); P. H. Winfield, Chief sources of English Legal History (Cambridge, 1925), pp. 266-268.

[52] "*Nullus disseisietur de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis*—this is to be understood thus: that one can recover by an assize of novel disseisen every manner of free tenement and every manner of 'real' possession of a fee or franchises wherefrom one is ejected otherwise than by lawful judgment."

"*Nullus exultetur aut destruatur*—this is to be interpreted thus: that one has an action to appeal all judges, all suitors, all assessors, all executants of judgments who destroy a man against the right course and the right rules of law." Mirrour of Justices, p. 180.

[53] "This article whereby the king grants that he will not disseise nor imprison, nor destroy any man *nisi per legale iudicium,* renders invalid the statute de Mercatoribus and other statutes and should be thus interpreted: *Nullus Capiatur,* none is to be taken unless it be by warrant founded on a personal action. (Here we must distinguish, for if the action is venial, no imprisonment is justifiable save for default of mainpernors, and so it appears that none can be imprisoned for debt, and if any statute be made repugnant to this article, whether it concern debts due to the king or debts due to others, it is not to be obeyed.) *Nullus utlagetur*—here one must understand 'unless it be for mortal felony whereof one is found suspected by oaths of ones neighbours who are sworn *quasi ex officio* in the manner customary in eyres.' And this clause annuls the statute which outlaws a man for arrears on an account, and other similar statutes." Mirrour of Justices, pp. 179, 180. The statute de Mercatoribus refers to the Statute of Merchants which provided for imprisonment for debt. 1 Statutes of the Realm (1283), p. 53. The First Statute of Westminster chapter 11, outlawed a man for arrears on account. 1 Statutes of the Realm (1275), p. 26.

[54] "Introduction to Mirrour of Justices," p. xxxvii.

time in a clear cut fashion the conception of a fundamental statute by which other statutes might be tested as regards their validity.[55] It is probable that this idea was not original with the writer of this work but was rather common property. We find Edward II revoking the Carta Mercatoria "because the same was made contrary to the Great Charter,"[56] and in 1368 it was enacted that a statute passed on a presentment made contrary to the thirty-ninth article of Magna Carta "shall be void."[57] The articles against Richard II give us additional evidence that, during the Fourteenth Century, a mere passage of Parliament was not enough to constitute an act the "law of the land."[58]

§ 18. It is thus incontestable, as Professor McIlwain has so well pointed out,[59] that there were a considerable

[55] Fortescue, following mediaeval usage, looked upon any statute, if enacted by Parliament, as a "constitution." *DeLaudibus,* ch. 15.

[56] The New Ordinances, 5 Edward II, c. 11. Adams and Stephens, Select Documents, p. 93. See also, Select Cases before the King's Council (1243-1482) (edited for the Selden Society by I. S. Leadam and J. F. Baldwin, Cambridge, 1918), Vol. XXXV, p. lxxvi.

[57] 42 Edward III, c. 1. "It is assented and accorded, that the Great Charter and the Charter of the Forest be holden and kept in all points; and if any Statute be made to the contrary, that shall be holden for none."

C. 3 "At the request of the commons by their petitions put forth in this Parliament to eschew the mischiefs and damages done to divers of his commons by false accusers, which oftentimes have made their accusations more for revenge and singular benefit, than for the profit of the King or of his people, which accused persons, some have been taken, and others caused to come before the King's council by writ and otherwise upon grievous pain against the law; it is assented and accorded, for the good governance of the commons, that no man be put to answer without presentment before justices, or matter of record, or by due process and writ original, according to the old law of the land; and if anything be henceforth done to the contrary, it shall be void in the law and holden for error." This statute is sometimes called a "Statute of Westminster." 1 Statutes of the Realm, p. 388. For a criticism of the view point of the text see Plucknett, Statutes and Their Interpretation, pp. 27, 28.

[58] Article XXX, "The said king, without any reasonable or lawful cause whatsoever, or any other process of law, did in his parl. encompassed in warlike manner by armed men, adjudge Tho. of Arundel, lord abp. of Canterbury (primate of all England, his spiritual father absenting himself by the treacherous counsel of the said king) to banishment, against the laws of his kingdom, so by him sworn to as aforesaid." (1399). Cobbett, Parliamentary History, Vol. I, col. 263.

[59] Charles Howard McIlwain, "Magna Carta and Common Law"; (Malden, Commemoration Essays), pp. 122-179.

number of acts, awards, etc., which were declared void as being against Magna Carta or the Fundamental Law. Indeed throughout the Middle Ages there was a continual effort to treat Magna Carta as a fundamental law different from the common law although it guaranteed it, and superior to statute law although it was itself an enactment. But in spite of the fact that an act of Parliament was not looked upon with as much reverence as the great traditional fundamental portions of the common law and such documents as Magna Carta and the Charter of the Forest,[60] it can hardly be said that it was a well recognized legal principle that legislation should be controlled judicially by such standards as the great English constitutional documents afforded. The English were not on the verge of evolving a written constitution as one might suppose, but were rather looking for justification of certain political acts in the great body of fundamental law which had grown up as the English policy had developed.[61] It was not because a matter was inscribed in Magna Carta that it was considered constitutional, but rather because of the inherently fundamental character of the liberty involved. The English nation was developing through the evolution of the common law certain principles of legal fitness, inherent justice, and fundamental rights which in the course of time might furnish the basis for the liberties of the later centuries. On the other hand, however, the fact that certain of these rights and liberties were inscribed in documentary form is not without its significance, especially in view of the subsequent developments on the American continent. Furthermore, an additional halo of veneration was undoubtedly ascribed to certain liberties, as for example the right to a just, lawful, and regular accusation and trial in criminal cases, because they were inscribed in a revered constitutional document.

[60] McIlwain, High Court of Parliament, pp. 46, 47, 62-64.
[61] Plucknett, Statutes and Their Interpretation, pp. 70, 71.

CHAPTER IV.

ENGLAND'S FUNDAMENTAL LAW.

§ 19. The concept of fundamental law had arisen out of the flux of constitutional concepts which surged through the formative period of the English constitutional system, and the Tudor period witnessed the development par excellence of this system. In the main the Tudors were shrewd enough to be guided by the fundamental elements of the English common law and rather to bend them to the royal will than to deliberately break through the network of the constitution as they found it. Additional organs of government were devised to meet special conditions,[1] and frequently revolutionary enactments of a far-reaching character were passed,[2] but in every case the spirit of the common law was made to breathe through the innovation to give it life. That the English constitution was molded by these changes cannot be questioned, but the important thing is that the dependence of the new upon the old was universally recognized. The work of such men as Sir Thomas More, Sir Edward Coke, and Sir Francis Bacon is evidence of the important place the common law had found in the life of the realm.[3]

[1] Parliament met more and more frequently and came to assume a larger place in the governance of the nation, even though at times it was shamefully bullied and dictated to by the monarch. It is interesting to note that one of the reasons given for the establishment of the Court of Star Chamber (1487), was that the convictions by the regular courts of justice were so slow as to enable felons to break the peace with impunity. 2 Statutes of the Realm, p. 509.

[2] For example: *Lex Regia* gave the king power to ordain law that should have the force of statute in a limited group of cases. 3 Statutes of the Realm p. 726. Note also the Dissolution of the Monasteries, 3 Statutes of the Realm, p. 733.

[3] This was reflected in the plays of the newly developing theater.

Side by side with the idea of the common law as an element in the English constitution had arisen the conception of natural law and natural right. Evolving out of the *jus gentium* of the Roman Empire, it achieved a very considerable importance with the spread of the study of Roman Law throughout Europe during the Middle Ages.[4] Indeed, it is not putting the matter too strongly to say that it was viewed as a norm by which the validity of statutes, religious and civil, were to be tested.[5] The doctrine of natural law was elaborated on the continent by such thinkers as Suarez[6] and Grotius,[7] and that the doctrine was not unknown in England is evident from the writings of Sir John Fortescue.[8] In appropriating this doctrine the English endeavored to weave it into the already flourishing warp of the common law, and thus we find the law of nature, common right and reason, and the common law frequently linked together.[9]

Shakespeare frequently refers to the majesty and supremacy of law (Merchant of Venice, Act III, Scene iii, line 26; 2d Henry VI, Act III, Scene i, lines 58, 237; Othello, Act I, Scene ii, line 86), and in one case there is an obvious reference to the thirty-ninth article of Magna Carta.

"Before I be convict by course of law,
To threaten me with death is most unlawful."
Richard III, Act I, Scene iv, line 192.

[4] James Bryce, Studies in History and Jurisprudence (Oxford, 1901), pp. 75-94.

[5] O. F. Gierke, Political Theories of the Middle Ages (translated by F. W. Maitland, Cambridge, 1900), p. 84.

[6] Dunning, Political Theories from Luther to Montesquieu, pp. 137-142.

[7] Dunning, Political Theories from Luther to Montesquieu, pp. 164-171.

[8] Sir John Fortescue, On the Nature of the Law of Nature (1470) cited in Dunning, Political Theories from Luther to Montesquieu, pp. 201, 202.

[9] McIlwain, High Court of Parliament, ch. II, Bryce, Studies in History and Jurisprudence, pp. 600, 601. In Lord Cromwell's case Chief Justice Wray declared: "if the Act was private . . . . then the said Act was against the law, and reason, and therefore void." 4 Coke (1578), 12, 13, Dalton in his hand book for the country justices shows this intermingling in an admirable way: "The common laws of this Realm of England receiving principally their grounds from the laws of God (the Law of God is the Law of the Land), and Nature (Which Law of Nature as it pertaineth to man, is also called the Law of Reason—Common Law, is common reason—), and being for their antiquity, those whereby this Realm was governed many hundred years before the Conquest; the equity and excellency whereof is such, as that there is no humane Law within the circuit

§ 20. The courts were occasionally called upon to decide questions involving the fundamental law, and from the time of the Model Parliament, in 1295, until the Cromwellian Revolution there was a steady stream of *dicta* that statutes which were contrary to common right and reason, the law of nature, or the common law were unenforceable.[10] Magna Carta, due to its preeminent position in the English common law, was often cited as evidence of what was the fundamental law.[11] As early as the reign of Edward III it was said a statute would be void if it was against common right,[12] and under Henry VI (1422-1461) an act giving summary powers of confiscation to a corporation of dyers in London was held to be against the law of the land.[13] A steady stream of *dicta* to similar effect continued throughout the Tudor period,[14] and at

of the whole world, by infinite degrees, so apt and profitable for the honorable, peaceable and prosperous government of this Kingdome, and so necessary for all estates, and for all causes, concerning Life, Lands or Goods, as these Laws be: These Laws (I say) even from their beginning, have continued a special care for the conservation of the peace of this Land." Michael Dalton, The Countrey Justice (London, 1655), p. 1.

[10] A review of these cases will be found in McIlwain, High Court of Parliament, pp. 262-298, and Brinton Coxe, Essay on Judicial Power and Unconstitutional Legislation (Philadelphia, 1893), pp. 143-180. For a criticism of the *dicta* in them see Plucknett, Statutes and Their Interpretation, esp. pp. 66-71.

[11] Sir Thomas More, England's most distinguished lawyer of his day, was beheaded because he refused to admit that Parliament could legally make certain statutes, particularly the Act of Supremacy, 1534 (2 Statutes of the Realm, p. 492), C. B. Elliott, "The Legislature and the Courts," Political Science Quarterly, Vol. V (June, 1890), p. 228, note. When pressed for his reason for saying that Parliament could not make such statutes, he declared that if they were contrary to Magna Carta they were void. William Roper, Life of Sir Thomas More (edited by J. R. Lumby with Sir Thomas More's Utopia translated by Raphe Robynson, Cambridge, 1879), Introduction p. 50.

[12] Thomas Tregor's Case, 8 Edward III (1335), 38b.

[13] The corporation had been granted powers to search and forfeit any cloth which they found dyed with logwood. The court held: "That this charter concerning the cloth was against the law of the land, and this statute; for no forfeiture can grow by letters patent." Sir Fortunatus Dwarris, Treatise on Statutes (London, 1830), Part II, pp. 807, 808.

[14] In the Case of Dale Manor (1509), the court held a saving clause in an Act of Parliament which seemed to destroy the main value of the act as void partly because it was repugnant to the rest of the act and partly because it took away vested rights. Jenkins (Exch.) p. 196, pl. 4.

one time in the early part of the Seventeenth Century it almost seemed as if the courts were establishing the principle of judicial control through the interpretation of Magna Carta. Sir Edward Coke laid the foundations for this development in Calvin's case[15] and the year following he decided Dr. Bonham's Case in which his position was stated more clearly and forcefully.[16] It was with reluct-

This same rule was asserted by William Sheppard, Touchstone of Common Assurances. (2d ed., London, 1651), pp. 78, 79.

In the Case of the Ordinance of St. Alban's (*circa* 1550), the court declared it to be against Magna Carta to give a municipal corporation power to make certain kinds of ordinances. Dwarris, On Statutes, Part II, p. 807, 808.

In Stroud's Case (1572) it was held that seigniory of land is extinct by possession of the king notwithstanding a saving clause in an act of Parliament. Dyer 313a; 1 Anderson 45; 3 Leon. 58. This case was consistently followed during the Stuart period. Farrows & Curson v. Farmer & Ferres, 2 Roll. (1619) 246, 247; Fawkeners v. Bellingham, 3 Croke (tempus Car. 1628), 82, 83; Case of Alton Woods, 1 Coke (1600) 47a.

See also the implication of Chief Justice Wray in Lord Cromwell's Case, 4 Coke (1578) 12, 13.

[15] Coke's decision is to the effect that Parliament might not take away certain fundamental rights of a citizen. If an act did take away these rights it was the duty of the king to step in and aid the injured subject. 4 Coke (1609) 14.

[16] Power had been given to certain members of the College of Physicians in London to grant licenses to practicing doctors. It was provided that if this college found anyone practicing without a license from them, they should imprison him as a violator of the law. Coke declared that this statute made the members of the College a party and judge to the same cause which was impossible under the common law. "And it appears in our books that in many cases the common law will controul Acts of Parliament, and sometimes adjudge them utterly void, for when an Act of Parliament is against common right and reason, or repugnant or impossible to be performed the common law will controul it and adjudge such act to be void." His words are only *dicta* in this case and the authorities he quotes, upon close examination, seem not clearly in point. (These authorities are collected in Coxe, Judicial Power and Unconstitutional Legislation, pp. 174-177. See also Quincy (Mass.) pp. 521-524 note 23). Nevertheless it seems that the two other judges of the court agreed with Coke's interpretation of these cases (see the account in 2 Brownlow's Reports 265, and in 8 Coke Reports (edition of 1826) 118a), and it is certain that this decision had a very far reaching influence. Dr. Bonham's Case, 8 Coke (1609) 115. E. S. Corwin, Doctrine of Judicial Review and Other Essays (Princeton, 1914), pp. 68, 69.

Coke reiterated his views in his Institutes. "Against this ancient, and fundamentall law [Magna Carta, ch. 39] and in the face thereof, I find an act of parliament made, that as well justices of assise, as justices of peace (without any finding or presentment by the verdict of twelve men), upon a bare information for the king before them made should have full

ance, however, that even Coke declared a statute inoperative[17] and the rule seemed to be that the court should if possible so alter the meaning of the law by the fiction of interpretation as to make it unnecessary to declare it void.[18] Nevertheless, despite this reluctance, Coke's *dictum* was followed by both Chief Justice Holt[19] and Judge Hobart,[20] although in each case the words of the

power, and authority by their discretions to heare, and determine all offences, and contempts committed, or done by any person, or persons against the forme, ordinance, and effect of any statute made, and not repealed, &c. By colour of which act, shaking this fundamentall law, it is not credible what horrible oppressions, and exactions, to the undoing of infinite numbers of people, were committed by Sir Richard Empson Knight, and Edm. Dudley being justices of peace, throughout England; and upon this unjust and injurious act (as commonly in like cases it falleth out) a new office was erected, and they make masters of the kings forfeitures.

"But at the parliament, holden in the first year of H. 8, this act of 11 H. 7, is recited and made voide, and repealed.... [for the reason of its injustice] and the ill success hereof, and the fearfull ends of these two oppressors, should deterre others from committing the like, and should admonish parliaments, that instead of this ordinary, and pretious triall *per legem terrae*, they bring not in absolute, and partiall trialls by discretion." Vol. II, p. 54.

Coke makes like statements in his discussion of the Petition of Right, Cobbett, Parliamentary History, Vol. II, col. 264.

[17] As Professor McIlwain has said, it was impolitic to do so. High Court of Parliament, p. 64. In another portion of the Institutes he states his position more mildly. Vol. II, p. 288; and in still another he seems to repudiate his earlier statements. "Of the power and jurisdiction of the parliament, for making of laws in proceeding by bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds." He follows this statement with a number of striking examples of the power of parliament to interfere in matters affecting private rights. *Ibid.*, Part IV, p. 36. See R. A. MacKay, "Coke—Parliamentary Sovereignty or the Supremacy of the Law," Michigan Law Review, Vol. XXII (Jan. 1924), pp. 215-247.

[18] McIlwain, High Court of Parliament, pp. 260-267.

[19] An act of Parliament constituted the mayor and aldermen of London a court to try cases to which the city might be a party. Chief Justice Holt declared: "What my Lord Coke says in Dr. Bonham's Case.... is far from any extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and judge, or which is the same thing, judge in his own cause, it would be a void act of Parliament; for it is impossible that one should be judge and party." London v. Wood, 12 Mod. (1614), 669, 687, 688.

[20] A custom was found not to have been confirmed by act of Parliament, but Judge Hobart continued to say: "By that which hath been said it appears, that though in pleading it were confessed, that the custom of certificate of the customs of London is confirmed by Parliament, yet it made no change in this case, both because it is none of the customs intended, and because even an Act of Parliament, made against natural

justices were but *dicta*. Two years later Coke repeated it in Bagg's Case, even going so far as to identify the "law of the land" with "justice and right."[21]

§ 21. Probably Lord Ellesmere was the only important justice of this period who placed himself on record as dissenting from this doctrine,[22] and even he did not go as far as to say that all statutes must be enforced.[23] Possibly acting upon the advice of Lord Ellesmere,[24] King James called for a statement from Coke regarding his reasons for the judgment given in Bonham's Case, but Coke's reply[25] that he was relying on precedents well established and was not laying down new law seemed to satisfy the monarch for the time being. It was not until

equity, as to make a man Judge in his own case, is void in itself,. for jura naturae sunt immutabilia. and they are leges legum." Day v. Savadge, 2 Hobart (1615) 86, 87.

[21] Bagg was disfranchised of rights he possessed as burgess. Coke held that the town corporation must have express warrant in the charter to take these rights from him, and must give him notice and hearing if the procedure "will be *per legem terrae*." Otherwise "such removal is void, and shall not bind the party... and such removal is against justice and right." 11 Coke (1616) 93b, 99a.

[22] Sir Francis Bacon declared in his "Brief Discourse upon the Commission of Bridewell" (1587), that the charter of a city was valid only if it accords with the law and cites Magna Carta ch. 39 as one of the provisions of the law which is violated by this charter "both in matter, sense, and meaning." He then proceeds to cite the Confirmation of the Charter in 42 Edward III which provides that if an act be passed contrary to its articles it shall be holden for none. Sir Francis Bacon, Works (edited by James Speeding, R. L. Ellis, D. D. Heath, Boston, 1861), Vol. XV, pp. 15, 16.

[23] In giving Sir Henry Montague the oath as Chief Justice of the King's Bench (1616), Lord Ellesmere spoke with approval of Montague's grandfather who had been Chief Justice of the Court of Common Pleas and who "challenged not powers for the judges of this court to correct all misdemeanors as well extra judicial as judicial, nor to have power to judge statutes and Acts of Parliament void, if they conceive them to be against common right and reason; but left the King and the Parliament to judge what was commonright and reason. I speak not of impossibilities or direct repugnances." Moore (K. B.) 826.

[24] Quincy (Mass.), pp. 521-524, note 23. Lord Ellesmere took the position that in Dr. Bonham's Case, Coke had taken the law by the horns and had thrown it as it please him with a total disregard for precedents. Observations on the Reports, p. 21.

[25] "The Humble and Direct Answer to the 4th Question Arising Out of Dr Bonham's Case." Published in Sir Francis Bacon, Works (edited by Basil Montague, Esq., Philadelphia, 1852), Vol. II, pp. 506, 507.

Coke applied a similar doctrine to the powers of the king that he fell out of favor at court.[26] Indeed it is hardly too much to say that the doctrine that Magna Carta was a portion of the fundamental law of the land and as such should control the organs of government was very generally accepted[27] until the middle of the century when the "Agreement of the People" failed to go into effect.[28] This document provided for a Parliament with limited powers, some of the limitations suggesting markedly the influence of Magna Carta.[29] Its failure, together with that of the other serious attempt at constitution making—the "Instrument of Government" (1653)—marks the

[26] In 1613 he was "penally promoted" to the Chief Justiceship of the King's Bench, a position carrying with it less power and pay but more honor. S. R. Gardiner, History of England from the Accession of James I to the outbreak of the Civil War (London, 1891), Vol. II, pp. 207, 208. In 1616 he was dismissed entirely from office for refusing to delay the decision of cases until the justices had had an opportunity to consult with the king. *Ibid.*, Vol. III, pp. 9-25. The idea of a fundamental law which should limit Parliament was, of course, urged by the partisans of the King who objected to the rapid encroachments of that body upon the royal prerogative. William Ball referred to Magna Carta as such a fundamental statute and declared that the king must have the veto power to keep statutes in accord with it. "The Power of Kings Discussed" (1649) in Lord Somers, Collection of Scarce and Valuable Tracts (London, 1750-1768), Vol. IV, pp. 506-516.

[27] A similar reason was assigned for the abolition of the Court of Star Chamber in 1641. The Preamble of the act abolishing it stated that the judges of that court had not proceeded according to the thirty-ninth section of Magna Carta as confirmed by Edward III. 5 Statutes of the Realm, p. 110.

[28] This famous document was drafted by a council of the Army under Cromwell in 1648 and 1649. It failed to become effective largely because of delays due to the determined opposition to certain features by the radicals under John Lilburn, and the persistent attempts of the Rump Parliament to retain all governmental powers. Edward Jenks, The Constitutional Experiments of the Commonwealth (Cambridge, 1890), pp. 25-36.

[29] Some of the provisions seem to be obvious paraphrases of ch. 39 of the Great Charter.

"Eighthly.... 5. That the Representative may not give judgment upon any man's person or estate, where no law hath before provided; save only in calling to account and punishing public officers for abusing or failing in their trust.

"6. That no Representative may in any wise render up, or give, or take away, any of the foundations of common right, liberty, and safety contained in this Agreement, nor level men's estates, destroy property, or make all things common;...."

This portion of the document was, it was agreed, "fundamental to

culmination of the effort to establish in England a government of "laws and not of men."[30]

The trend away from the position of Coke had thus set in,[31] was reflected almost immediately in the courts, and very quickly the doctrine of judicial control of Parliament on the basis of Magna Carta died out. Captain John Streater, who had been imprisoned by order of Parliament, pleaded that his imprisonment was illegal because it was contrary to the "law of the land." The court answered that it must bow to legislative supremacy.[32] A decade later the Earl of Shaftesbury petitioned the court of King's Bench to release him from the tower on a writ of habeas corpus. His plea was refused on the ground that, since he had been committed for contempt

our common right, liberty, and safety; and therefore do both agree thereunto, and resolve to maintain the same, as God shall enable us." (Article 10). Certain other sections were "useful and good for the public." S. R. Gardiner, Constitutional Documents of the Puritan Revolution (Oxford, 1899), pp. 359-371.

30 The "Instrument of Government," in spite of the fact that the difference between fundamental and statutory law is ignored in it, is none the less important as being the only written constitution which has formed, nominally at least, the basis of a government in England. Adams & Stephens, Select Documents pp. 407-416; Jenks, Constitutional Experiments, pp. 76-92. The "Agreement of the People" and the "Instrument of Government" must be looked upon as being the prototypes of the American Constitution. Adams, Constitutional History of England, pp. 323-329.

31 Some even disparaged the importance of Magna Carta. Booth in his zeal for legal reform declared that it was only guess work if John had granted the charter and at most it was only a grant by the king and had not even the importance of a statute. His real objection to the Charter, however, was religious. "That this Charter, called Magna Charta, chiefly intended the advancement of the Powers of Antichrist, there is nothing more evident, and needs no other proof, but what is therein contained." A. Booth, *Examen Legum Angliae:* or The Laws of England examined, by Scripture, Antiquity, and Reason. Cujus author *Anagrammatos est* (London, 1656), pp. 14, 15.

32 The charge against Streater was "publishing seditious phamphlets against the State." He argued that Parliament could not make the "law of the land" for that means the "consent of our forefathers." Justices Garmond and Nichols refused to listen to his argument and dismissed it summarily with the remark: "If the Parliament should do one thing, and we do the contrary here, things would run round. We must submit to the legislative power." It is very evident that the whole trial was entirely political in nature and that there was a determination to keep Streater in prison to prevent his spreading propaganda against the revolution. As soon as Parliament was dissolved he was released without trial. 5 Howell State Trials (1653) 366.

by order of the Lords, the courts had no power to interfere even though the entire proceedings against him were contrary to Magna Carta.[33] The court in these cases was clearly relying more upon political necessity than upon the law but they represent a trend, which in the next century was to predominate. In 1739 William Petyt published his *Jus Parliamentarium* in which he contended that acts of Parliament were not to be changed or altered by the courts, even by interpretation.[34] Some twenty-six

[33] Shaftesbury contended that the Lords were not above the law and that the King's Bench "will and ought to judge of an act of Parliament void, if it be against Magna Carta." Shaftesbury's Case, 6 Howell St. Tr. (1676) 1269. The same case is reported in 1 Mod. 144, 3 Keble 792. For a similar statement by Shaftesbury see 6 Howell St. Tr. 1179.

In trying an inheritance case on appeal from the court of chancery the House of Lords ordered Fagg, a member of the Commons to appear before them. He refused on the ground of parliamentary privilege and the Commons arrested the officers sent to bring him by force before the Lords. The Lords protested that this proceeding was against Magna Carta and that their officers should be released at once. To this the Commons answered: "As to what your Lordships call a transcendant invasion of the rights and liberty of the subject, and against Magna Carta, the Petition of Right, and many other laws; the House of Commons presume that your Lordships know, that neither the Great Charter, the Petition of Right, nor many other laws, do take away the law and custom of Parliament, ... But the Commons cannot find, by Magna Charta or by any other law or ancient custom of parliament, that your lordships have any jurisdiction in cases of appeal from courts of equity." Shirley v. Fagg, 6 Howell St. Tr. (1675) 1121 at 1162.

A number of other cases in which *Lex Parliamenti* and *Lex Terrae* came into conflict will be found in Carl Wittke, History of English Parliamentary Privilege, Ohio State University Studies in History and Political Science, number 6 (Columbus, 1921), chaps. V-VI.

Note also the statement of William Bohun that Statute law "is far Superior to both the other, and is of Force to Abolish and Revise, Explain, Alter, or Annul any Law whatsoever." *Institutio Legalis:* or, an Introduction to the Study and Practice of the Laws of England (London, 1724), p. 10.

[34] The third chapter is entitled: "Several Precedents produced to prove, that an award in Parliament was of so high a Regard in the law, that it could not be changed, or altered by any interpretation of the Judges in Westminster Hall, and that because it was an Act of Parliament." The second precedent is the case of a man whose lands had been seized by the king, and the king's right had been affirmed by Parliament. The disseized man protested that Magna Carta 39 was violated by this action but Petyt declared that "whosoever looks into the Nature of this Precedent, and will seriously examine the circumstances thereof, must confess, that it is very incongruous and absurd to suppose, that the Judges in Westminster Hall durst presume, after the Dissolution of Parliament, to change or alter anything in their award, by their interpretation." William Petyt, *Jus Parliamentarium* (London, 1739), Part I, ch. III, pp. 32-34.

years later the court decided that if Parliament wished to prevent injustice caused incidentally by the repeal of an act they must make special provision for it.[35] The same year Blackstone published his famous Commentaries on the Law of England, in which he gave a classic statement of the omnipotence of Parliament.[36] Blackstone's great influence, together with the growing importance of Parliament,[37] struck the death knell to the rapidly dying

[35] A statute compelled Miller to give up his effects to satisfy a creditor. However, while there was a delay in the proceedings the law compelling him to do this was repealed and the court declared that as soon as the law was repealed their jurisdiction ended. If Parliament had intended this particular case to be excluded they would have made special provision for it. Miller's Case (1765) 1 W. Blackstone 451. In another case Lord Kenyon remarked that the court would like to be able to change the Act of Parliament if it were possible to do so. This was impossible, however, as the court was bound by the act. Warne v. Varley et al., 6 Durn & E. (K. B., 1795) 443.

[36] "Acts of Parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions, though I know it is generally laid down more largely, that acts of Parliament contrary to reason are void. But if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of the statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature which would be subversive of all government.... But, if we could conceive it possible for the Parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no." Sir William Blackstone, Commentaries on the Laws of England, (edited by T. M. Cooley, Chicago, 1884; first edition London, 1765) Vol. I, p. 91. He was followed in this view by Sullivan who claimed that a man may be exiled by an act of Parliament which would be *"per legem terrae."* F. S. Sullivan, Historical Treatise on the Feudal Law and the Constitution and Laws of England; with a Commentary on Magna Carta (London, 1772), pp. 406, 407. De Lolme, six years after Blackstone wrote, made his classic statement that Parliament can do anything but make a man a woman. Herman Cohen, Spirit of our Laws (London, 1907), p. 20. It is worthy of note that Sir William Blackstone was himself a careful student of the history and content of Magna Carta and published probably the first reliable text of that document. The Great Charter and Charter of the Forest, with other Authentic Instruments; to which is prefixed an Introductory discourse, containing the History of the Charters (Oxford, 1759).

[37] Many members of Parliament seemed to be exceedingly sensitive

view,[38] and in 1861, the *dicta* in Dr. Bonham's Case was expressly overruled.[39] There is no question that Blackstone's statement is the law of England at the present time.[40]

§ 22. It must not be concluded that the belief in the desirability of a limited Parliament died out entirely after the execution of Charles I. On the contrary there was no small amount of protest against the doctrine which culminated in the modern English view of the impotence of the courts.[41] The Levellers had placed the Law of Nature

about their powers. See T. C. Hansard, Parliamentary History of England (London, 1813), pp. 177, 178.

[38] Just how far Coke's views in this respect became popular is an open question. Neither Filmer, Milton, nor Harrington seemed to attach any importance to the doctrine for none of these writers discuss it in their principal political work. Sir Robert Filmer, Patriarcha, or the Natural Power of Kings, (edited by Henry Morley with Locke's Treatises on Civil Government, London, 1887, first published, 1680); John Milton, Ready and Easy way to Establish a Free Commonwealth (London, 1660); James Harrington, Commonwealth of Oceana (London, 1656). It would seem that this view was confined largely to students of the law, but among those it was very prevalent. William Shepard, writing in 1658, reflects very clearly the influence of this line of thought. "All Statutes that agree with the Statutes of Heaven, and Ordinances of God, though they cross, and utterly overthrow any of the former Statutes or Laws of the Nation, are good. But if they be expressly repugnant to the Laws of God, as that no man shall help or comfort them that be in distress; they are not good, but utterly unlawful; but it must be made by all the Parliament. See Crompt. Jur. 190, 34 H. 6, 40.

"The exposition of Statutes belongs onely to the Judges, and the Justices of Courts." William Shepard, An Epitome of the Common and Statute Laws of This Nation, now in force (London 1658), p. 918.

[39] Chief Justice Erle stated that the portion of the case in which Coke declared acts of Parliament to be void if they were against common right and wisdom was only *dicta*, and that Coke wished to support the graduates of Cambridge and consequently ruled thus to prevent an affrontery to the University. Kemp v. Neville, 10 C. B. (N. S.) (1861) 522. See also In re Hammersmith Rent-Charge, 4 Exch. (1849) 87.

[40] A. V. Dicey, Law of the Constitution (London, 1885), ch. I; Edward Fischel, English Constitution (translated by R. J. Lee, London, 1863, pp. 384-506. Sir P. B. Maxwell, On the Interpretation of Statutes (edited by F. Stroud, London, 1912), pp. 246, 422-424; James Kent, Commentaries on American Law (New York, 1826), Vol. I, p. 447; J. Willes, Lee v. Bude & Thorrning Junction R. R. Co., 40 L. J. C. P. 285, 289; L. R. 6 C. P. 576.

[41] "Magna Carta contains many moral Lawes, which by the Law of the Land a Parliament cannot alter." For example, chapter forty, that justice shall not be sold, p. 463 However, he considers that an "Act of Parliament" is the "Law of the land" (p. 455) and distinguishes the thirty-ninth section of Magna Carta from the phrase "due course of law" on

and the great constitutional rights which Englishmen had inherited from their forefathers in Magna Carta far above ordinary statutes.[42] Cromwell had somewhat similar ideas,[43] and in 1655 Sir Roger Twysden maintained that Parliament had no more right to invade the rights and liberties of the subject than had the king.[44] Locke's discussion of the limitations on the legislative power reflects anything but the modern English doctrine of judicial subservience,[45] and it is noteworthy that in this respect he

this ground. David Jenkins, "*Lex Terrae* or Laws of the Land," in Somers, Tracts, Vol. VI; David Jenkins, Works of that Grave and Learned Lawyer upon Divers Statutes (London, 1648). Walter Mantell disagreed in this respect with Coke's statement that "due process of law" and the "law of the land" were one and the same thing and declared that "the law of the land" referred to the law sanctioned by parliament. "A Short Treatise of the Laws of England" (1644), Somers, Tracts, Vol. V, pp. 420-429.

[42] John Cook had declared that the Law of Nature not only supplements the laws of men, but overrides them. G. P. Gooch, History of English Democratic Ideas in the Seventeenth Century (Cambridge, 1898), p. 184. Some of the Levellers declared that even the people themselves could not deprive the citizens of the state of certain fundamental rights, such as those found in Magna Carta. *Ibid.*, p. 205.

[43] "In every government there must be somewhat fundamental, somewhat like a Magna Carta, which should be unalterable. That Parliaments should not make themselves perpetual is a fundamental. Liberty of Conscience is a fundamental. That the command of the Militia should be placed so equally that no one party in Parliament or out of Parliament have a power of ordering it is a fundamental."

"Of what assurance is a law to prevent an evil if it be in the same way legal to unlaw it again? Are such laws like to be lasting?" Oliver Cromwell, Speech, September 12, 1654, quoted in Gooch, English Democratic Ideas, pp. 234, 235.

[44] Twysden, although a very generous man, refused both shipmoney to Charles I and a loan to the Long Parliament because he considered them both contrary to the ancient rights and liberties of the English subject. Sir Roger Twysden, Certain Considerations upon the Government of England (edited from the unpublished manuscript with introduction by J. M. Kemble, London, 1849), Camden Society Publications, Vol. XLV, pp. lxxxiii, 174-180.

[45] "Whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees, by indifferent and upright judges, who are to decide controversies by those laws, and to employ the force of the community at home only in execution of such laws, or abroad to prevent or redress foreign injuries and secure the community from inroads and invasion. And all this to be directed to no other end but the peace, safety, and public good of the people." Book II, ch. IX, sec. 131. "These are the bounds which the trust that is put in them by the society and the law of God and Nature have set to the legislative power of every commonwealth, in all forms of government. First: They are to govern

was followed to a very considerable degree by Burlamaqui,[46] Bolingbroke,[47] and Lord Camden.[48]

by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at Court, and the countryman at plough. Secondly: These laws also ought to be designed for no other end ultimately but the good of the people. Thirdly: They must not raise taxes on the property of the people without the consent of the people given by themselves or their deputies. And this properly concerns only such governments where the legislative is always in being, or at least where the people have not reserved any part of the legislative to deputies, to be from time to time chosen by themselves. Fourthly: Legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have." John Locke, Two Treatises of Government (edited by Henry Morley, London, 1884), Book II, ch. XI, sec. 142.

[46] "Though the legislature be a supreme, yet it is not an arbitrary power; but on the contrary, it is limited in several respects:" Among the limitations which he mentions are those of natural or primitive law which is based on justice, and the laws of God. J. J. Burlamaqui, Principles of Natural and Politic Law (translated into English by Mr. Nugent, 4th ed., Boston, 1792), Part III, ch. I, sec. 10-18, pp. 292-294.

[47] Not only was the power of parliament far from being a complete one in a general sort of way, but that body was even limited in its taxing power. Henry St. John, Viscount Bolingbroke, "Remarks on the History of England," Works (Philadelphia, 1841), Vol. I, p. 424. Compare likewise this significant statement: "A parliament cannot annul the constitution; and whilst that is preserved, though our condition may be bad, it cannot be irretrievably so. The legislative is a supreme, and may be called, in one sense, an absolute, but in none an arbitrary power." To support this position he cites Locke's views on the limitations on legislative power and concludes by saying that at least parliament can make no law altering the position of the crown or itself under the constitution. "Dissertation on Parties," Works, Vol. II, p. 150.

[48] Lord Camden in discussing the Repeal of the Stamp Act states: "My lords; he who disputes the authority of any supreme legislature treads upon very tender ground." T. C. Hansard, Parliamentary History of England (London, 1813), Vol. XVI, p. 168. In another speech the same day he declares that it is only a waste of time to consider the Declaratory Act, "for to what purpose, but loss of time, to consider the particulars of a Bill, the very existence of which is illegal, absolutely illegal, contrary to the fundamental laws of nature, contrary to the fundamental laws of this constitution? A constitution grounded on the eternal and immutable laws of nature; a constitution whose foundation and centre is liberty, which sends liberty to every subject, that is or may happen to be within any part of its ample circumference. Nor, my lords, is the doctrine new, it is as old as the constitution; it grew up with it; indeed it is its support; taxation and representation are inseparably united; God hath joined them, no British Parliament can separate them; to endeavour to do it, is to stab our very vitals." *Ibid.*, pp. 177, 178. This speech caused a considerable stir and portions of it so offended Mr. Grenville that he declared it was a libel upon Parliament and should not be printed. Almon's Biographical Anecdotes, Vol. I, p. 377, cited in *Ibid.*, p. 178; R. G. Adams, Political Ideas of the American Revolution (Durham, N. Car., 1922), pp. 128, 129.

Likewise in legal circles Coke's doctrine retained some of its former virility. Commentators and compilers of the law reiterated the words of Sir Edward and summarized the cases which followed his views. Some of them, as did Viner, even stated the rule more broadly than before,[49] some frankly admitted that there is some diffi-

[49] "The Law consists of three parts, viz. 1. Common Law. 2. Statute Law. 3. Custom. Statute Law corrects, abridges, and explains the Common Law. Custom takes away the Common Law. But the Common Law corrects, allows and disallows both Statute Law and Custom. For if there be Repugnancy in Statute, or unreasonableness in Custom, the Common Law disallows and rejects it; per Coke, Ch. J. 2. Brownl. 198. Trin. 10 Jac. C. B. in Case of Rowles v. Mason—Cites 8 Rep. Dr. Bonham's Case." Charles Viner, General Abridgment of Law and Equity (London, 1743), Vol. XV, Title "Law" p. 48.

However, Viner was not unilateral in his views for his work being in the nature of a compilation necessarily reflected the conflicting tendency of the traditional authorities of the Common Law. In light of this fact the following quotations are significant "Lex Parliamenti *is lex terrae.*" *"Lex Communis Angliae,* the Common Law of England, sometimes called *Lex Terrae."* "The common Law has no Controller in any Part of it but the High Court of Parliament, and if it be not abrogated or altered by Parliament it still remains. Co. Litt. 115b—The Common Law is the absolute Perfection of Reason. 2 Inst. 179—It is a dangerous Thing to alter or shake any of the fundamental Rules of the Common Law, which in Truth are the Main Pillars and Supporters of the Fabrick of the Commonwealth. 2 Inst. 74—S. P. 210—The Common Laws are Aptly and Properly called the Laws of England;...

"The Common law of England, is grounded on the Law of God, and extends itself to the original Law of Nature, and the Universal Law of Nations. When it respects the Church, it is called *Lex Ecclesiae Anglicanae,* as Magna Charta, chap. 1.... When it respects the Crown and the King, it is sometimes called *Lex Coronae*... When it respects the Common Subjects, it is called *Lex Terrae;* as in Magna Charta, chap. 29...." *Ibid.,* pp. 47, 48. "An Act of Parliament can create an Estate Tail without a Donor; and where we see estates limited for a particular purpose; we are not to measure the Validity of such Limitations by the strict Rules of the Common Law for the Parliament can controul the Rules of Common Law." *Ibid.,* Vol. XIX, Title "Statutes," p. 494.

But on the very pages in which he reflects the growing doctrine of Parliamentary supremacy, Viner makes statements that might have even startled Coke. "An Act of Parliament made against Natural Equity as to make a Man judge in his own Cause would be void; for *Jura Naturae sunt immutabilia."* He cites Coke, Holt, and Hobart in this connection. *Ibid.,* p. 494. "It appears in our Books, that in several Cases the Common Law shall controul Acts of Parliament, and sometimes adjudge them to be utterly void; For when an Act of Parliament is against Common Right and Reason, or repugnant, or impossible to be performed, the Common Law shall controul it, and adjudge it to be void." *Ibid.,* pp. 512, 513. "Some things are exempt and excepted out of the Provision of Statutes by the Law of Reason, though the Words of the Statute are contrary." "Judges have sometimes expounded the words of an Act of Parliament merely contrary

culty in reconciling the view of Coke with the newer view,[50] while others implied in a rather ambiguous sort of fashion that certain laws passed by Parliament may not be law.[51] In 1713 it was said that the court would "strain hard" rather than declare a law void, the natural implication being that if the statute were sufficiently contrary to the fundamental principles of the English Constitution the court would refuse to enforce it.[52] Blackstone recognized the prevalence of the older view,[53] and although he condemned it as wrong, was not entirely consistent for he declared that neither laws contrary to the law of nature nor special acts of the legislature confiscating goods can be considered "law."[54]

to the Text, and sometimes have taken Things by Equity of the Text contrary to the Text, to make them agree with Reason and Equity." *Ibid.*, p. 514.

See also Jacob Giles, A New Law Dictionary (London, 1739), article entitled "Law."

[50] Thus Finch in his discussion of the law of nature and the law of reason declares that the common law is framed by the light of the law of nature. In bold-face type he lays down the general principle that "Therefore laws positive, which are directly contrary to the former [law of nature], lose their force, and are no laws at all." However, in his explanatory discussion it appears that the matter is not quite as clear as one might think from the heading. "As those which are contrary to the law of nature, [e. g. Egyptian laws making women do men's and men do women's work, Thracian laws making theft commendable, etc.] .... But because the law of reason is known only to such as are able to judge aright, and that but imperfectly (as before was shewed) therefore here the case is harder, what laws may be said agreeable, and what repugnant thereunto; only in general (which is sufficient for this place and purpose) it is truly said, and all men must agree, that laws indeed repugnant to the law of reason, are as well void as those that cross the law of nature." Sir Henry Finch, Law or a Discourse thereof (translated and edited by Danby Pickering, London 1759), pp. 75, 76.

[51] This view is implied in Bacon's Abridgment (1735) and Comyn's Digest (1762-67). E. S. Corwin, Doctrine of Judicial Review and Other Essays (Princeton, 1914), p. 30, n. 45.

[52] See the argument of Sir Thomas Powys, the counsel for the plaintiff in Thornby v. Fleetwood, 10 Mod. (1713), 114, 115. A similar judicial attitude, along a somewhat different line, is found in Rex v. Justices, 3 Burrow (K. B., 1764) 1456; Rex v. Gaskin, 8 Term Reports (1799) 209.

[53] Blackstone, Commentaries, Vol. I, p. 91.

[54] "This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this

§ 23. Some political pamphleteers objected to parliamentary supremacy because it tended to give too much power to the newly developing cabinet[55] and a little later

original." Blackstone, Commentaries, Vol. I, p. 41. "Municipal law thus understood, is properly defined to be a 'rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.' Let us endeavor to explain its several properties, as they arise out of this definition. And, first, it is a *rule*: not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law." *Ibid.*, Vol. I, p. 44. "The statute law of England does therefore very seldom, and the common law does never, inflict any punishment extending to life or limb, unless upon the highest necessity; and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of the law." *Ibid.*, Vol. I, p. 133.

[55] John Shebbeare in interpreting the rights of Englishmen as they were secured by the Revolution of 1688 declared: "If instead of removing the Causes of your Sufferings, and fixing your Rights and Liberties, you then gave the P——t an unlimited Authority to dispose of the latter according to their Inclination; you only changed the Possessors of arbitrary Power, by granting to them what you denied the King, and thus this illustrious Action of the Revolution must appear to be the Result of Faction, Caprice, Aversion to one Interest, or unwarrantable Zeal for another. For how is a Nation to become more settled in its Freedom by transferring arbitrary Power from one Part of the Constitution to another; any more than a man become more rich who makes the Conveyance, by which a hundred thousand Pounds pass from one Hand to another, without a Shilling resting in his possession?

"Certainly the Laws that were then enacted to establish the Constitution, ought to be considered of a more permanent Nature than Laws in common, of a less interesting Intention; the very Basis and Boundary of the King's Prerogative and Peoples Rights; something in the government like the Center in the Earth, the fixed Point, round which all Things move, and to which they tend; or according to the opinion of some Philosophers, like the plactick Nature, or Creative Power, which inmixed and animating all, is immutable in itself.

"The Acts which were then made relative to this Constitution, such as the Bill of Rights, and since, in Consequence of it, the Act of Settlement, which may be justly deemed the Compact between the present Royal Family, and you the People of *England:* are certainly of a Nature more unchangeable and sacred than those which establish a Turnpike, and not to be altered or defeated with the same Ease as an Act which removes the Fair-Day of a Market Town from *June* to *September.*

"Ought not those Acts, founded on your former Rights in *Magna Charta,* to be considered rather as the essential Authority by which P——nts exist, than Laws which a P——nt may abrogate, through pure Inclination to indulge a M——r or depress a free People." Pages 11, 12.

"... the People, had they given the Power of ruining this Constitution to their Representatives, ought to have been considered lunaticks, and

their actions illegal, and the Representative punished, who had given up their Privileges in consequence of it." To do this would be the same as giving permission to another man to take your life.

Because the Constitution of England is one of a free state with a mixed government it "must in its Nature, be supposed superior to the united Powers of P——nt, the Rule and Bounds of their Proceedings; and though it is generally said, that every kind of Government must have an absolute Power to rest somewhere in it, surely it cannot be meant an absolute Power to do Injustice, or destroy itself, more than an individual Man has to commit Suicide....

"Surely it be acknowledged, that, though the Commons have exercised a Power of Annihilating many Privileges and Rights belonging to the People, that they can possess no reasonable Title to it, then all Laws subversive of *Magna Charta*, the Bill of Rights, Act of Settlement, and Spirit of the Constitution are an Excess of their Authority and a Violation of their Trust." Pages 14, 15.

Furthermore, since only one-third of the people elect members of Parliament they cannot be said to bind the whole people for the Rights belong to them all. In this regard Parliament has no more power than the King. Pages 16, 17.

"Probably the Reasons why your Progenitors, in the antient fundamental Statutes of the Realm, have delivered nothing, verbally explicit on this Head; of limiting the Powers of their Representatives, derives its origin from the same cause that the *Romans* had no Laws against Parricide; They never conceived that the Thought of betraying or selling a People's Liberties, anymore than murdering a Father, could enter the human Heart: They neither imagined that the Representative could ever possess an Interest distinct from that of his constituent, or that pecuniary advantage could out weigh the publick good in his Breast: They did not foresee, that M——rs might one Day have occasion to oppress you for the Support of German Princes, or that Englishmen, no longer animated by the Soul of Public Prosperity, might degenerate into granting oppressive Taxes, 'till the Nation would be brought within one Step of Ruin: or that Laws, essential to the Establishment of Freedom and Security of the State, could, like Bubles blown by Boys, be made to reflect different Colours as the Light was directed upon them, or burst as the Mandate of a M——r, by the Breath of a Majority of five hundred men." Pages 19, 20.

"Indeed, though no Statute, as far as I can recollect, has mentioned the Limitation of p———y Power before the Revolution, yet it is manifest from the Bill of Rights, that the Enactors of that Law, having conceived what pecuniary persuasion and M——rs might hereafter obtain on the Parliament, have inserted a Clause [Paragraph i] that the Rights then ascertained were no Innovation on the Constitution, and that their successors were obliged to follow them...." Page 23.

He then takes up one by one the privileges of the Bill of Rights and declared that "the suspending of the Laws by Ministers (or by King) without the consent of P——nt, violates *Magna Charta* and the English Charter of Rights unpardonably." Pages 29-49, esp. 31. (John Shebbeare), A Fifth Letter to the People of England on the Subversion of the Constitution: and the necessity of its being restored (2d ed. London, 1757). The whole pamphlet is a tirade against the rise of cabinet government and the control of the ministry over Parliament. In particular the author arraigns the German alliance. The pamphlet was published anonymously. Shebbeare was a staunch Tory and defended the Policy of George III in America against Price and Burke. He received a pension in 1764 and thereafter was a steady advocate of court measures! G. L. Norgate, "John Shebbeare" Dictionary of National Biography (N. Y., 1897), Vol. 52

the American Revolution brought out some very bitter critics of the doctrine of Legislative sovereignty.[56] Some of these writers relied to a very considerable degree upon the thirty-ninth section of Magna Carta in supporting their contention that Parliament is limited by the "law of the land" and consequently could not take the property of the colonists, or their rights to trial by jury, without their consent.[57] Furthermore, the fundamental character of Magna Carta and its unalterable place in the British Constitution is demonstrated by exceedingly ingenious, if somewhat illogical arguments,[58] and the obvious con-

[56] Dr. Richard Price, Observations on the Nature of Civil Liberty (London, 1776), p. 11; Glanville Sharpe, A Declaration of the People's Natural Right to a Share in the Legislature (London, 1774) pp. 233-241; Francis Peter Plowden, Native Rights of British Subjects (London, 1784), pp. 120-124; "The Crisis" No. XI (London 1775, reprinted in New York (1776), pp. 81-87; (John Fothergil) Considerations Relative to the North American Colonies (London, 1765), pp. 29, 30; Arthur Lees, An Appeal to the Justice and Interests of the People of Great Britain (4th ed., London 1776), pp. 7, 8 (in "Political Tracts," Vol. IV).

[57] Plowden blends together Coke's doctrine in Bonham's case and the view of Locke that legislative power should be limited. Native Rights of British Subjects, pp. 120-124. Sharpe expressly repudiates the doctrine of Blackstone that Parliament is supreme. Declaration of the People's Natural Right, pp. 233-241.

[58] "And farther, it is apparent, that the said 'due Process of the Law,' by a Jury *de vicineto,* is now become an unalterable part of the Constitution, and must ever remain in force, not only against all contrary Resolutions and Opinions of the Judges, (such as I have mentioned,) but even against the express authority of any Act of Parliament that happens (inadvertently) to have been made to the contrary, because all such must necessarily 'BE HOLDEN FOR NONE,' according to the 42. Ed. III. ch. I, which is cited by Judge Jenkins for that purpose:[66] and, though it may be alleged, against the authority of this Act of Parliament, that another Act may unbind what it has bound, according to the maxim, *'eodem modo quo quid constituitur, eodem modo dissolvitur:'* yet a due consideration of this very maxim will afford us a substantial argument to the contrary: for, at the time the said Act was made (viz. in the 42 Ed. III), the Great Charter had been expressly confirmed by many Parliaments, not only on the reigns of that noble king's ancestors, but also by at least TWELVE preceding Parliaments even in his own glorious reign; so that the Parliament in his 42d year, had certainly sufficient authority to add, to their confirmation of the Charters, that, 'if any Statute be made to the contrary, that shall be holden for none.' And the reason is plain; for no Statute whatever (*eodem modo constituitur*) is ordained by so great authority as that which Magna

[66] *Jenkinsius Rediwivus,* p. 65.

clusion that the judges should refuse to enforce acts of Parliament against this fundamental law is stated even

Charta has at length acquired, by the express confirmation, from time to time, of so many different Kings and Parliaments:[68]

The wisdom of ages has made it venerable, and stamped it with an authority equal to the Constitution itself, of which it is, in reality, a most essential and fundamental part; so that any attempt to repeal[69] it would be treason to the state! This glorious Charter must, therefore ever continue unrepealed: and even the articles, which seem at present useless, must ever remain in force, to prevent the Oppressions and Prerogatives, there named, from being extended beyond certain limits in case the same should ever hereafter be revived. No single Act of Parliament can unbind or remove the limits here laid down: nothing less than the same accumulated Authority, by which the Charter is now established, can possibly set it aside, or any part of it, according to the Maxim before recited, *'eodem modo quo quid constituitur, eodem modo dissolvitur:'* for no single Act of Parliament, *'eodem modo constituitur,'* is ordained in the same manner. The many repeated confirmations of its authority were a work of ages; so that the said authority cannot legally be set aside, unless it be done *eodem modo quo constituitur,* that is by the repeated suffrages of as many Parliaments against it as have already expressly confirmed it; and God forbid that any such gross depravity and corruption should ever obtain such a continuance in this Kingdom, as to accomplish so great an evil; for that could not be without a total national reprobacy, dangerous to us not only in this world, but also in the next!" Sharpe, Declaration of the People's Natural Right, pp. 199-204.

"It cannot be denied, but that the laws, which were then enacted to establish upon a foundation not to be again shaken, the freedom of the English nation, and the liberties of the people of the Kings prerogative, and the rights of Englishmen, something in the government like the center of the earth, the fixed point, round which all things move, and to which they tend.

"Those acts which were made the Revolution, relative to the constitution, such as the bill of rights and .... are undoubtedly of a nature more sacred than those which establish a turnpike road.

"Those acts, founded on our former rights in Magna Charta, ought to be considered as the essential authority by which the House of Commons exists, than laws which a Parliament may abrogate through pure inclination to indulge a King or his Ministers, to make them despotic, and the people miserable; for it must appear strangely absurd in a constitution,

[68] In the time of Sir Edward Coke the Charters had been expressly confirmed by THIRTY-TWO DIFFERENT PARLIAMENTS, as he himself witnesses in the proeme of his 2d Institute: "The said 2 Charters" (says he) "have been confirmed, established, and commanded to be put in execution, by 32 several Acts of Parliament."

[69] "Though some particular articles of Magna Charta are indeed rendered useless, at this day, by subsequent Statutes, yet this affords no argument against the general stability of the Charter, with respect to its main object, the Freedom of the People. It is a Charter of Liberties, and therefore the subsequent Statutes, which enlarged those Liberties (by annihilating the several oppressive customs which are mentioned therein and limited within certain bounds, as Knights Service, Escuage, Wards, and Liveries, &c), cannot be said to operate against the Charter, but rather in aid of it; for though the said oppressive Tenures and dangerous Prerogatives are permitted by the Charter in a certain degree, yet the apparent intention of the several Articles, wherein they are mentioned, was not to establish, but only to restrain them, as much as the circumstances, temper, and prejudices of those early times would permit; so that the Statutes, which afterwards entirely removed the oppression, cannot be esteemed contrary to the purpose of the Charter, because they enlarged those Liberties and Franchises of the people, to which the Charter itself is so apparently dedicated."

more definitely than Coke had declared it nearly two centuries before.[59]

that the representatives of the people, who form a third part of it, should be authorized by them to destroy their liberties, and thereby exclude them from the rights which they possess in the government....

"Something must exist in a free state, which no part of it can be authorized to alter or destroy, otherwise the idea of a constitution cannot subsist; for unless we allow the freeholders and electors of Great Britain to be superior to a House of Commons, we grant to them an absolute power, a power inconsistent with the notion of a free people, and destructive of the principles of a mixed government.

"Should it be acknowledged, that though the Commons have exercised a power of annihilating many privileges and rights to the people, and that they possess no legal title to it, then all laws subversive of Magna Charta, the bill of rights, act of settlement, and spirit of the constitution are an excess of their authority, and a violation of their trust, for which the present infamous parliament ought not only to be dissolved, but every member who visibly engaged in the destruction of the peoples' rights, would suffer death...." "The Crisis" No. XI, pp. 81-87. The acts complained of especially are those for the coercion of the colonies. The dependence of the argument in this tract upon that of Shebbeare is noteworthy especially when we consider that they belong to opposing parties! See *supra*, n. 55.

[59] "It must, therefore, be obvious to every person, who duly considers all these circumstances, that the Resolutions of 'all the Judges in England,' in the cases of Orurke, or Ornicke, the *Irishman*, and *Sir John Perrot*, were contrary to A FUNDAMENTAL LAW in the Great Charter, and Consequently ought to be 'HOLDEN FOR NONE,' according to the express determination of the Parliament, in the 42 Ed. III, c. I."[70] Sharpe, Declaration of the People's Natural Right, pp. 204-207.

Sharpe was active in the freeing of the slaves and the support of the American cause during the revolution. His Declaration of the People's Natural Right was written to prove that the right of trial by a jury composed of the accused's neighbors should extend to the American Colonies and to Ireland. Before writing this work he spent seven years in legal and historical research. Dictionary of National Biography, s. v. Sharpe, Granville (1735-1813).

[70] Viz. "That the Great Charter and the Charter of the Forest be holden and kept in all points; and if any Statutes be made to the contrary, 'THAT SHALL BE HOLDEN FOR NONE,' and ought to be 'VOID IN THE LAW and HOLDEN FOR ERROUR,' according to the second chapter[71] of the same excellent Statute; because the two Acts of Parliament, of the 33 and 35 H. 8. on which they grounded their opinion, cannot have any legal force, (notwithstanding the literal meaning of the general expressions therein), when applied to offenses committed in any country, province, or colony whatsoever, that is subject to the imperial crown of Great Britain: so that even if Ireland had been 'especially named' therein, the said Acts would have been so far from binding that kingdom, (according to the effect supposed by Lord Coke, Judge Vaughan, Judge Blackstone, and others), that the very naming Ireland, for such purposes as were intended by the said Acts, would have rendered them absolutely 'null and void,' and to be 'holden for none,' because they would in that case, have been directly contrary to the Great Charter; whereas, at present, there are some particular cases (as I have before remarked) wherein, they may, perhaps, be allowed a legal force."

[71] ....."It is assented and accorded, for the good governance of the Commons, that no man be put to answer, without Presentment before justices, or matter of Record, and by DUE PROCESS AND WRIT ORIGINAL, according to the OLD LAW OF THE LAND" (which I have already proved to signify, in an especial manner, the Trial by a Jury of the Vicinage); "and if ANY THING, from henceforth, be done to the contrary, it shall be void in the Law and holden for Error."

§ 24. A survey of this line of development can leave no doubt that up to the last quarter of the Eighteenth Century,[60] English opinion was by no means unanimously behind the officially growing doctrine of Parliamentary supremacy. The complacent conservative Whigs looked back with unconcealed satisfaction upon the "glorious Revolution" wrought by Parliament in 1688, but the radical elements, represented in turn by Coke, Twysden and Sharpe, were not so sure that all was well. They insisted rather upon the importance of due process of law and its fundamental character in the English constitution as a norm for the determination of the validity of statutes.

The reverberations of this doctrine continued for many decades. In fact, the Great Charter is still recognized as the basis of the fundamental law of England in so far as certain great principles of the present day English government may be said to have had their origin in it.[61] But it is a long step from the viewpoint of Coke and Sharpe to the present all but universal acceptance of the omnipotence of Parliament. In a measure the method by which this change has been brought about may be seen by an examination of the objections which were raised during the last century to many of the innovations made necessary by the rapid industrial development of that period.[62]

[60] Mr. Amos, cites a debate in Parliament in 1784 relative to the constitutional power of that body to suspend the laws. Sir John Fortescue, *De Laudibus Legum Angliae* (edited by Andrew Amos, Cambridge, 1825; translation of 1775). Pages 60, 61 n.

[61] A. L. Lowell, Government of England (N. Y., 1908), Vol. II, p. 471.

[62] Between 1830 and 1840 there was a strong movement for sanitary legislation which would give a central administrative board power over local health matters. The Poor Law Act of 1834 shows this tendency. The opposition to such a centralization of governmental authority harked back to the laws of Alfred, Edward the Confessor, and even the German Volksfreiheit. They endeavored to foster a special reverence for the English common law and even went so far as to look with contempt upon statutes. They declared, "Parliament could not, and should not, change any principle of the common law. They even adopted the old contention of the Whigs and Tories, that the constitution cannot be altered by majority votes because it is a part of the common law." Josef Redlich, Local Government in England (edited by F. W. Hirts, London, 1903), Vol. I, pp. 144-146.

In no case is the influence of Blackstone upon liberal thought more evident than in the case of Tolmin Smith. Here we find an argument against the increasing power of Parliament and centralization through governmental commissions based upon the very premises which Coke and Sharpe used.[63] Not only is a fundamental law necessary in every society, but he contends that Magna Carta is peculiarly fundamental to the English government due to the solemnity of the occasion upon which it was promulgated, the frequency of its reiteration, and the fundamental features which it contains.[64] Statutes, to be legitimate, must conform to this fundamental law, and merely because a declaration is an Act of Parliament is no guarantee that it is according to the principles of the English common law and custom.[65]

[63] Coke is quoted frequently to support his views. J. Tolmin Smith, Governmental Commissions Illegal and Pernicious (London 1849), pp. 39, 43, 44, 127; J. Tolmin Smith, Local Government and Centralization (London, 1851), p. 397.

[64] "Acts done under circumstances of peculiar solemnity and general attentiveness must always be of more weight than acts done in the ordinary course of every-day business... Any change in such principles can only be made under circumstances of like solemnity and sanction as those under which they were first declared. And if, at time after time of like solemnity and sanction, the same principles have been redeclared and reiterated, the moral sanction which they carry becomes, each time, the stronger, and their character as Fundamental Laws and Institutions becomes the more determinately fixed, and the more important to be insisted on... Of such a nature was Magna Charta...." Smith, Government by Commission, pp. 41, 42.

[65] "Parliament has it not within the scope of its powers to violate the fundamental law of the realm. It has been over and over again declared that all and every such Acts of Parliament are null and void." Smith, Local Government, pp. 108, 109.

"Statute Law, to be legitimate, must always be but illustrative of the broad and fundamental principles of the Common Law. When Statute Law assumes either openly or stealthily, to over-ride Common Law, the fact affords in itself evidence that usurpation is going on, and that the liberties of the nation are in danger. It has been seen that even self-consent cannot authorize any abridgment or violation of the rights and liberties which the free genius of the Common Law guarantees to all." *Ibid.*, p. 121.

"There is a prevalent notion that an Act of Parliament is something supreme. It is a mistake. The Constitutional principle does not allow of such a cover for mere despotism." *Ibid.*, p. 123. See also Smith, Government by Commissions, pp. 236-238.

At this point the influence of Blackstone becomes apparent. Smith carefully refrained from quoting any of the statements of his predecessors to the effect that the courts may refuse to enforce acts of Parliament which have thus transgressed upon the fundamental law. Indeed, he seems to see a danger in the doctrine of judicial supremacy, for are not courts themselves centralizing agencies?[66] Judicial review of legislation, as far as England was concerned, was dead. Liberals and conservatives alike looked only to public opinion, the sense of fair play, and the inconvenience of attempting innovations, for the enforcement of the fundamental principles of the constitution.[67] Even at the present time, there is considerable school of political thought which follows Coke in the belief that Parliament is limited in its powers. It is very significant, however, that the most vigorous of this group, i. e., the pluralists, have no desire to substitute judicial supremacy for parliamentary omnipotence.[68]

[66] He refers to the situation which had developed in the United States and warns his readers from inferring that he is proposing a Supreme Court with such powers as the American. Such an Institution would be exceedingly dangerous in England. "The Courts of Law of this country have already done immense mischief to the cause of human development and the activity of Free Institutions, by the assumption of a power of declaring the Law in a manner which does not belong to them; and by narrowing down its free and expansive spirit more and more from time to time, agreeably to the purposes of centralization, but in entire antagonism with the spirit of the Common Law. Happily there is in England no Court of Law which is supreme. It is clearly dangerous, beyond exaggeration, that four individuals should be intrusted with power to determine, finally and absolutely, what is, and what is not, consistent with the Constitution. It may well be supposed that two Houses of Legislature, attentive to their duties, are far more likely to come to a right conclusion upon such points than any four individuals can ever be.

"A 'Constitution' is of little worth if it can only be understood by lawyers, and expounded by Courts of Law." Smith, Local Government, pp. 126, 127.

[67] A. V. Dicey, Law of the Constitution (London, 1885) ch. XV; Lowell, Government of England, Vol. I, pp. 10-15; Walter Bagehot, The English Constitution (N. Y., 1887), pp. 295-304; C. F. G. Masterman, How England is Governed (N. Y., 1922), pp. 217-218.

[68] See particularly the writings of F. W. Maitland, J. N. Figgis, H. J. Laski, and G. D. H. Cole. These are described in R. G. Gettell's History of Political Thought (N. Y., 1924), ch. 29, 30.

§ 25. The influence of Coke may be found in the attitude of the English courts at the present time as well as in the writings of political theorists. In some cases they have recognized indirectly the very principles which he attempted to apply directly. A very significant line of cases has grown out of the rule of statutory construction that the courts must give justice in the particular case before them, even though the express words of the statute may not seem to warrant such a decision. In following this rule, the English judges have sometimes ignored parts of statutes, inserted other parts by implication, and sometimes have gone as far as to wrench deliberately the act from its obvious meaning. But what is still more significant is the fact that in some of these cases the courts of England seem to have in mind the very principles of justice which form the basis of the American concept of due process of law.[69] The practical exigencies of the con-

[69] Thus the court will read into statutes granting discretionary powers the provision that all those powers must be exercised in a regular, reasonable and just manner without caprice or arbitrariness. Maxwell, Interpretation of Statutes, pp. 204-210.

Statutes will be construed prospectively, if possible, especially in cases where vested rights are involved. *Ibid.*, pp. 350-358. See especially Gillmore v. Shooter's Executors, 2 Mod. (K. B., 1691) 310; Gilmore v. Shuter, 2 Levinz (K. B., 1690) 227; Couch v. Jeffries, 4 Burrow (1769) 2460; Rex v. M'Kenzie, Russ. & Ry. Cr. Cas. (1820) 429; Maggs v. Hunt, 12 More (C. P., 1827) 357; Key v. Goodwin, 4 Moore & Payne (C. P., 1830) 341.

Notice and hearing will be implied in the statute even though there is no specific provision for it. This is also true of certain other judicial duties. Maxwell, On the Interpretaton of Statutes, pp. 487-496. The earlier cases of this kind are particularly interesting for they sometimes rest the decision partly upon the interpretation of the statute and partly upon the ground that any other interpretation of it would render the act void. Bagg's Case, 11 Coke (1616) 93b; Manners v. Pern, 10 Mod. (1714) 156; King v. University of Cambridge, 8 Mod. (1716) 148, 1 Strange 557, 2 Lord Ray. 1334, Fortescue 202. The language of the court in this last case is especially significant as indicating a middle ground between the older view of Coke and the present rule, and it shows very clearly the relationship between these two concepts. See also Rex v. Gaskin, 8 Term Reports (1799) 209; Capel v. Child, 2 C. & J. (Exch., 1832) 558; Bonaker v. Evans, 16 Q. B. (1850) 162, 71 E. C. L. 162. An Act of Parliament gave the Board of Public Works of Wandsworth District power to summarily destroy buildings built without their permit. In applying this statute the court per J. Byles, declared: "Although there are no positive words in a statute requiring that the party shall be heard, yet the justice

duct of government and the administration of justice have developed both practical and judicial limits to the doctrine of Blackstone. The fundamental law, with Magna Carta chapter thirty-nine as its core, still remains the basis of much of English legal and political thought, although it is enforced to a lesser extent and by different methods than in the United States.

of the common law will supply the omission of the legislature." Cooper v. Board of Works, 14 C. B. (N. S.) (C. P., 1863) 180.

The courts will not give effect to orders of the King in Council in Prize Cases even though they are made in pursuance of an express direction in the statute, when such orders conflict with international law. The Zamora, Judicial Committee of the Privy Council, Law Reports (1916), 2 A. C. 77.

CHAPTER V.

ENGLISH CONTENT OF THE "LAW OF THE LAND."

§ 26. In the great English constitutional crises involving life, liberty or property, it was the concept of "due process of law" which took hold of men's minds most mightily. Fortunately for England these periods have been comparatively few, and for this reason, perhaps, the phrase's meaning had remained somewhat constant. Different stress was laid on different portions of the concept at different times, but in the main, it may be said that the whole content of the phrase centered around two principal ideas.

In the first place there is no doubt that the Englishman considered that judgments not made according to some recognized form of legal procedure were not due process of law.[1] This idea is, in fact, found in English law before the time of King John,[2] and there can be no question that the desire to prevent forfeitures and exactions except by a recognized legal procedure was one of the elements of Magna Carta chapter thirty-nine as it was sealed at Runnymede.[3] This idea persisted, in one form or another,

[1] Gneist, History of the English Constitution, Vol. I, p. 302.

[2] It was incorporated in the *Leges Henrici; "Unusquisque per pares suos judicandus est, et jusdem provinciae."* William S. Stubbs, Select Charters and other illustrations of English Constitutional History (Oxford, 1891), p. 126. The writ of novel disseisin, which had been in use since about 1166, charged the tenant with having disseised the demandant "unjustly and without a judgment." Glanville, *Tractibus de Legibus,* Lib. XIII, ch. 33. Pollock and Maitland consider this a similar idea to the "law of the land." History of English Law, Vol. II, p. 47. A similar idea prevailed in Scotland. Assise *Regis* David I, ch. V. (Acts of Parliament of Scotland, Vol. I, p. 6); *Leges Quatuor Burgorum* of King David, I, ch. VII. (*Ibid.,* Vol. I, p. 22.)

[3] Powicke, *"Per Judicium Parium"* (Malden, Commemoration Essays, pp. 102-104). See also Thayer's discussion of the Great Assize which

beyond the Tudor period and became one of the foundation stones upon which was built the protest against Stuart arbitrariness. Sometimes it took the form of a demand that the king should not personally order the collection of fines or the making of an arrest,[4] but more frequently the complaint was against abuses of judges, sheriffs, and other of the king's officers.[5] It was well recognized that the king might imprison those who were suspected of evil designs against the realm.[6] The protest was rather against the use of brute force in a flagrant and

was merely another step in the development of legality in England and has some striking resemblances to the idea of due process. Thayer, Treatise on Evidence, Part I, Development of Trial by Jury, pp. 56, 57.

[4] Articles against Richard II, arts. xxvii, xxx, Cobbett, Parliamentary History, Vol. I, cols. 262, 263; Case of Eustace de Stuteville, Bracton, notebook, Vol. III, pp. 123-125, Case 1106; Cases of Hubert de Burgh and Gilbert Basset, *Ibid.*, Vol. II, pp. 85, 664-667, Cases 85, 857.

[5] *Confirmatio Cartarum*, ch. 2, 1 Statutes of the Realm, p. 123; Case of Sheriffs of London, *Liber Custumarum*, Vol. II, p. 410; Bracton, De Legibus, Vol. II, p. 283, Vol. IV, p. 576; Mirrour of Justices, p. 180; Statute of Westminster, ch. 3, 1 Statutes of the Realm, p. 388; Case of London Dyers, Dwarris, On Statutes, Part II, pp. 807, 808; Case of Ordinance of St. Alban's, *Ibid.*, Part II, pp. 807, 808; Bridewell's Case, Bacon, Works, (edited by Speeding, Ellis and Heath) Vol. XV, pp. 15, 16; Case of Thomas Lancaster, Vinogradoff, "Magna Carta Chapter 39" (Malden, Commemoration Essays, p. 94).

[6] McKechnie, Magna Carta, p. 394; Sir Robert Filmer even went so far as to revive the absolution that had existed in the palmiest days of York supremacy over Parliament. "Although all causes are, and ought to be, referred to the ordinary process of common law, yet rare matters from time to time do grow up meet, for just reasons, to be referred to the aid of the absolute authority of the prince; and the statute of Magna Charta hath been understood of the institution then made of the ordinary jurisdiction in common causes, and not for restraint of the absolute authority serving only in a few rare and singular cases, for though the subjects were put to great damage by false accusations and malicious suggestions made to the king and his council, especially during the time of King Edward III, whilst he was absent in the wars in France, insomuch as in his reign divers statutes were made that provided none should be put to answer before the king and his council without due process; yet it is apparent the necessity of such proceedings was so great that both before Edward III's days, and in his time, and after his death, several statutes were made to help and order the proceedings of the king and his council." He cites a number of instances where they contended for and took power to try offenders in his council. These were, however, only "upon cause reasonable, upon credible information, in matters of weight." Sir Robert Filmer, Patriarcha; or the Natural Power of Kings (with John Locke, Two Treatises on Civil Government, edited by Henry Morley, 2d ed., London, 1887), ch. 3 par. 12, pp. 58-61. The Patriarcha was first published in 1680.

unusual manner by the king or the violation of the law by his subordinates. Indeed, the establishing of such institutions as the Court of Star Chamber and the Court of High Commission under the Tudors did not occasion a serious protest for some time,[7] the reason undoubtedly being that, in as much as these bodies preserved a form of legal procedure,[8] they were acquiesced in for the greater good of the English nation.

Out of the conception that the law of the land was violated if judgment was not given according to some recognized form of legal procedure grew the idea that this procedure must be of a certain form. As early as the Fourteenth Century due process of law was being mistaken for trial by jury.[9] As the jury system gradually began to supplant the older methods of trial—recognition, presentment, sectatores, ordeal, battle, etc.—and its popularity became greater and greater, it was but natural that men should come to regard it as the only form of legal

[7] E. P. Cheyney, "Court of the Star Chamber," American Historical Review, Vol. XVIII (July, 1913) pp. 727-750 at pp. 745, 746; A. V. Dicey, The Privy Council (N. Y., 1887), pp. 94-115.

[8] Cora Scofield, Study of the Court of the Star Chamber (Chicago, 1900), pp. 61-79.

[9] Rex v. Anon, 30, 31 Edward I. (Year Books, edited by A. J. Horwood, Rolls Series, number 31, London, 1863) Vol. III, p. 531. About 1400 a knight demanded trial by his peers, i. e., knights, and he was granted it in order to comply with the requirements of *judicium parium*. Several other cases are collected in Plucknett, Statutes and their Interpretation, pp. 150, 151.

For a review of the relation between the Great Charter and trial by jury see Walter Clark, "Magna Carta and Trial by Jury," American Law Review, Vol. 58 (Jan.-Feb., 1924), pp. 24-44.

It is now well settled that the Barons at Runnymede did not have trial by jury in mind. McKechnie, Magna Carta, pp. 134-138, 292, 293; Reeves, History of English Law, Vol. I, p. 241; Lesser, History of the Jury System, ch. XI, pp. 163-170; Gneist, History of the English Constitution, Vol. I, p. 302; Pollock and Maitland, History of English Law, Vol. I, p. 152, n.; Pipe, Constitutional History of the House of Lords, pp. 169-171; McGee, Due Process of Law, p. 5. It is furthermore very probable that, for some time after the advent of the jury system, other methods of trial—recognition, sectatores, ordeal, battle, etc.—were considered as much "due process" as trial by jury, if indeed not more so. It seems, however, that a trial by court martial was not one of the methods so recognized. Articles against Richard II, art. XXVII, Cobbett, Parliamentary History of England, Vol. I, col. 262.

procedure in criminal cases which was according to the "law of the land." This is the foundation upon which the erroneous superstructure of the Seventeenth Century was to be built.

By the time of Edward III it was recognized that much damage might be done by the imprisonment of a subject upon a false charge even though the regular judicial procedure might subsequently prove him innocent. It was this, among other things, that led the author of the Mirrour of Justices to bewail the neglect of Magna Carta,[10] and in order to protect the subject from arbitrary indictments and presentments the statute of 42 Edward III, c. 3, was passed.[11] This act seems not to have been followed when the case was one of exceptional importance, however, for the articles against Richard II charge him with the violation of it.[12] It is important, however, as furnishing the foundation for an additional claim of Parliament in the Petition of Right.

§ 27. The second element of the "law of the land" is not as definable as this first one and we find only the most rudimentary traces of it in the Middle Ages. Some scholars see in chapter thirty-nine of the Great Charter from the very first the protection of general justice and right.[13] According to such an interpretation, this article was the general norm of all governmental actions and should prove valuable at least as a moral precept controlling the government in all its dealings with individuals. It can hardly be contended that such a conception of "due process of law" gained any wide acceptance before the time of the Stuarts, but there is sufficient evidence to show that

[10] Mirrour of Justices (edited by Maitland), p. 179.
[11] 1 Statutes of the Realm, p. 388.
[12] Cobbett, Parliamentary History, Vol. I, col. 262.
[13] Adams, Origin of the English Constitution, pp. 242-244; McIlwain, "Due Process of Law in Magna Carta," Columbia Law Review, Vols. I, XIV, pp. 26-51; Vinogradoff, "Magna Carta Chapter 39" (Malden, Commemoration Essays, p. 85).

this conception existed and did find expression in certain noteworthy cases. There was a very common tendency to regard the "law of the land" as something equivalent to the common law and in almost every case it is looked upon as being the type of law which had formerly existed.[14] The author of the Mirrour of Justices fancifully suggests that the article includes the general idea of right and justice;[15] the Carta Mercatoria was repealed because imprisonment for debt was contrary to the Great Charter;[16] the king granted petitions of the Commons because what they asked was contained in the Charter;[17] and Sir Thomas More contended that there was something in the law of the land that prevented the king from supplanting the pope as the spiritual sovereign of England.[18] The idea of a residual substantive content of "due process of law" was at most exceedingly nebulous. It probably grew out of the general idea that governmental power should be limited; a concept which originated when all powers of government were concentrated in the hands of the sovereign. With the subsequent expansion of governmental activity and governmental forms an extension of the idea of due process was to be expected. Thus arose the idea that that phrase had a large residual content. Because so few occasions had arisen in which it was necessary to apply it in a specific manner, it remained a vast undelimited concept envoked chiefly to support those with grievances in particular cases in which redress could not be otherwise obtained.

§ 28. By the time of the Stuarts it cannot be doubted that the idea that all trials must conform to a regular form of legal procedure was so well established that it was

14 McGhee, Due Process of Law, p. 10.
15 Mirrour of Justices, (edited by Maitland), p. 180.
16 Adams and Stephens, Select Documents, p. 93.
17 McGhee, Due Process of Law, p. 10.
18 Roper, Life of More (In More's Utopia), p. 50.

axiomatic.[19] The difficulty arose, however, in determining just what was a legal form of procedure as defined by chapter thirty-nine of Magna Carta. Parliament contended that arbitrariness and summariness of procedure, in which there might be abundant opportunities for unfairness and injustice, was illegal. Francis Bacon had already declared that such power could not be given to Governor Bridewell,[20] but Parliament made their demands still more specific in declaring that the law of the land entitled them to both trial by jury and indictment by grand jury.

Ferdinando Pulton, in his exposition of "Triall by the Countrie" (1623), declared that the jury system was based upon the thirty-ninth section of Magna Carta.[21] Five years later when Lord Coke wrote his Commentary on Magna Carta[22] there was for the first time in English

[19] In re Cavendish (about 1587) the court cited Magna Carta chapter 39 to prove that the king could not grant a monopoly of the issuance of judicial writs, the granting of this monopoly to Cavendish was declared to be contrary to the "law of the land," and hence void. 1 Anderson (*circa* 1587), 152. Even King James recognized that a regular legal procedure was essential to all judgments. A speach in the Starre-Chamber, 1616. C. H. McIlwain, Political Writings of James I (Cambridge, 1918), Vol. I, p. 326-340.

[20] Francis Bacon, Works (edited by Speeding, Ellis and Heath), Vol. XV, pp. 15, 16. See *supra*, sec. 21, n. 22.

[21] "Trial by the Countrie, is a triall by jury. Common persons of that vicinage or neighborhood, where the treason or felonie was committed; which kind of triall seemeth also to be warranted .... (though not at first begune) by the before rehearsed statute of Magna Carta [ch. 39] .... And thereupon it is accordingly said that Knights, Esquires, Gentlemen, of great estate being indicted of treason or felonie be tried by their Peeres, viz. by their equals in degree, being also Knights, Esquires, Gentlemen or Merchants of good estate: and inferiour persons be likewise tried by their Peeres or equals, viz. by men of their own degree, or (most commonly) men of better or greater estate of degree." Ferdinando Pulton, *De Pace Regis et Regni* (London, 1623), pp. 188-190. A similar viewpoint was expressed by Sir William Stanford, *Les Plees del Corone* (London, 1607), Book III, ch. I, fol. 152. (First published London, 1557).

It must not be thought that this opinion was universally held. Selden writing in 1616 declared that *"lex terrae"* referred only to procedure by oath or wager of battle. John Selden, Notes on, *Fortescue's De Laudibus legum Angliae* (London, 1775), ch. 26, p. 87.

[22] His reason for the commentary on chapter 39 (he numbers it after the numbering of the statute 9 Henry III (1225) and calls it chapter 29, 1 Statutes of the Realm, p. 22), is stated as follows: "Upon this chapter,

history, an attempt to systematically set forth the meaning of this famous phrase. The identity in meaning between the "law of the land" and "due process of law,"[23] as well as the primary purpose of this article to protect the subject from oppressive uses of authority, were pointed out,[24] and his proposals for the prevention of oppression included both trial by jury and "Indictment or presentment of good, and lawful men, where such deeds be done,"[25] as well as the general conformity of the trial to the principles established by the common law.[26] Even if it be contended that the phrase "Judgment of his peers" refers only to the English peerage,[27] Coke saw in the

as out of a roote, many fruitfull branches of the law of England have sprung.

"And therefore first the genuine sense hereof is to be seene, and after how the same hath been declared, and interpreted..." Coke, Institutes, Vol. II, Part I, p. 50.

[23] "*Nisi per legem terrae,* But by the law of the land. For the true sense and exposition of these words, see the statute of 37 Ed III. chap. 8 where the words, by the law of the land, are rendered without due proces of law." Coke, Institutes, Vol. II, p. 53.

[24] "Every oppression against law, by colour of any usurped authority is a kinde of destruction, for *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud:* and it is the worst oppression that is done by colour of justice." Coke, Institutes, Vol. II, p. 53.

[25] "*Nullus liber homo capiatur, aut imprisonteur.* Attached and arrested are comprehended herein.

"1. No man shall be taken (that is) restrained of liberty, by petition, or suggestion to the king, or to his councell, unlesse it be by indictment, or presentment of good, and lawfull men, where such deeds be done. This branch and divers other parts of this act have been notably explained by divers acts of parliament, &c." Coke, Institutes, Vol. II, p. 52. In support of this view he cites the following statutes and other authorities: 5 Edward III. c. 9; 25 Edward III. c. 4; 37 Edward III. c. 8; 38 Edward III. c. 9; 42 Edward III. c. 3; 17 Richard II. c. 6; Rot. Parl. 43 Edward III. Sir John a Lees case numbers 21, 22, 23, etc., W. I. ca. 15. See also Coke, Institutes, Vol. II, p. 54 (quoted *supra,* sec. 20, n. 16).

[26] "Without being brought in to answere but by due proces of the common law." Coke, Institutes, Vol. II, p. 53.

[27] "6. *Per judicium parium suorum.* By judgment of his peers. Onely a lord of parliament of England shall be tried by his peers being lords of parliament; and neither noblemen of any other country, nor others that are called lords, and are no lords of parliament, are accounted *pares,* peers within this statute.... And it is here called *judicium parium,* not *veredictum,* because the noblemen returned, and charged, are not sworne, but give their judgment upon their honour and ligeance to the king, for so are all the entries of record, separately beginning at the puisne lord and so ascending upward." Coke, Institutes, Vol. II, p. 53. More than a century

wider term "law of the land" the same protection for the rest of the subjects.[28] In this respect Coke was interpreting the venerable document not so much with regard to its historical meaning as in the light of the legal development of his own time.

While it is undoubtedly true that the Institutes leave much to be desired from the point of view of historical research, it really mattered little if it were historically accurate or not. The important thing is that the Institutes were regarded as accurate and consequently had a tremendous influence upon subsequent interpretations of Magna Carta.[29] Indeed until the publication of Black-

later Sir Henry Finch disposed of this difficult portion of Magna Carta in the following curt manner: "Magna Chart., c. 29. A peer of the realm upon an indictment of felony or treason shall be tried by his peers." Law or a Discourse Thereof, p. 412.

[28] "This chapter containeth nine severall branches.

"1. That no man be taken or imprisoned, but *per legem terrae,* that is by the common law, statute law, or custome of England; for these words, *per legem terrae,* being towards the end of this chapter, doe referre to all the precedent matters in this chapter, and this hath the first place, because the liberty of a mans person is more precious to him, then all the rest that follow, and therefore it is great reason that he should by law be relieved therein, if he be wronged, as hereafter shall be shewed.

"2. No man shall be disseised, that is, put out of seison or dispossessed of his free-hold (that is) lands, or livelihood, or of his liberties, or free-customes, . . . as belong to him by his free birth right, unlesse it be by the lawfull judgement, that is, verdict of his equals (that is, of men of his own condition) or by the law of the land (that is, to speak it once for all) by due course, and processe of law . . . .

"5. No man shall be in any sort destroyed . . . unlesse it be by the verdict of his equals, or according to the law of the land.

"6. No man shall be condemned at the kings suite, either before the king in his bench, where the pleas are *coram rege* (and so are the words *nec super eum ibimus,* to be understood) nor before any other commissioner, or judge whatsoever . . . but by the judgment of his peers, that is equalls, or according to the law of the land." Coke, Institutes, Vol. II, pp. 50, 51.

"*Per legem terrae, i. Per legem Angliae,* and hereupon all commissions are grounded, wherein is this clause, *facturi quod ad justitiam per tinet secundum legem et consuetudinem Angliae,* . . . lest it might be thought to bind them only, but that the law might extend to all, it is said *per legem terrae, i. Angliae.*" *Ibid.,* Vol. II, p. 54.

[29] The argument of John Hampden's attorney in the Shipmoney Case shows this influence very clearly. Note particularly the argument that the levy of shipmoney was void because no trial by jury had been provided as required by Magna Carta. J. Rushworth, Historical Collections (London, 1721), Vol. II, appen. p. 162.

stone's Commentaries it was accepted as the most authoritative exposition of English law. His work was absolutely without rival during the entire Seventeenth Century[30] and the earlier commentators of the Eighteenth Century very generally adopt his view of due process.[31] The tenacity with which his views were retained is surprising for it was only very recently that the idea that Magna Carta does not guarantee trial by jury was given up.[32]

[30] "Although this commentary, like everything written by Coke, was long accepted as a work of great value, its method is in reality uncritical and unhistorical. The great lawyer reads into Magna Carta the entire body of the common law of the seventeenth century, of which he was admittedly a master." McKechnie, Magna Carta, p. 178. "Yet Coke, following his vicious method of assuming the existence, in Magna Carta, of a warrant for every legal principle of his own day, misled generations of commentators." *Ibid.*, p. 385.

[31] Henry Care, English Liberties or the Freeborn Subjects Inheritance (4th ed., with large additions by W. Nelson, London, 1719), pp. 26, 33, quotes Coke *verbatim* in this regard and gives as his reason for so doing: "Because my Lord Coke in the Second Part of his Institutes, has many excellent observations on this Chapter: I shall recite his very words.... Thus far the very words of that Oracle of our law, the Sage and Learned Coke, which so fully and excellently explains this incomparable Law, that it will be superfluous to add anything farther to this chapter." Thomas Wood, An Institute of the Laws of England (London 1722), likewise follows Coke very closely in this regard. Pages 609, 610. Matthew Bacon likewise has in mind Coke's views, "The trial *per pais,* or by a jury of one's country, is justly esteemed one of the principle excellencies of our constitution; for what greater security can any person have in his life, liberty, or estate, than to be sure of not being divested of, or injured in any of these, without the sense and verdict of twelve honest and impartial men of his neighbourhood, and hence we find the common law confirmed by Magna Charta, c. 29." Matthew Bacon, New Abridgment of the Law (edited by John Bouvier, Philadelphia, 1869; First ed., London, 1733-1766), Vol. V, p. 308, Title "Juries." Giles Duncomb sums up the all too prevalent but entirely unhistorical view when he declares: "And Trial by Juries was (as you see practised by the Saxons) continued by the Normans, and confirmed by Magna Charta; and was ever so esteemed and prized in this Island, that no Conquest, no Change of Government ever prevailed to alter it." Giles Duncomb, *Trials per Pais,* or the Law of England concerning Juries by *Nisi Prius,* &c." (8th ed. London, 1766), Vol. I, p. 3.

[32] Sharpe follows Coke in total in the interpretation of this chapter. Declaration of the People's Natural Right, pp. 180-198. See also Daines Barrington, Observations on the Statutes chiefly the more Ancient from Magna Charta to the 21st of James I, ch. XXVII (London, 1766), pp. 14-17. Tomson, Essay on the Magna Carta, 220-229; Sullivan, Historical Treatise on the Feudal Law, pp. 352-377; Edward Wynne, Eunomus, or Dialogues concerning the Law and Constitution of England (2d edition, London, 1785), Vol. III, pp. 270, 271; Sir Edward Creasy, Rise and Progress of the

§ 29. The attempt of Coke to include under the "law of the land" trial by jury and indictment and presentment by grand jury bore immediate fruit in another direction. In the very year in which the Institutes was published (1628) the effort of Charles I to arrest the "five knights" because of their opposition to his forced loans caused great popular indignation throughout England. The refusal of the court to release the prisoners brought sharply to a point the whole question of the power of the king to order arbitrary arrest and of the judges to keep in custody one so arrested without probable cause.[33] The white heat of the deliberations in parliament but reflected the temper of the country.[34] It is not too much to say that the Petition of Right was the direct outcome of this incident.[35] Early in April a Conference on Liberty was held by the representatives of the Lords and the Commons but because of disagreement the matter was referred to a second conference.[36] By this time the issue became clearly drawn. The chief bone of contention was the meaning of *"lex terrae."* The Commons, represented by Littleton, Noye, and Coke, demanded that the King should not have the power of arbitrary commitment unless the matter had been decided by the judges. The Lords in supporting the king, on the other hand, contended that it was not necessary to secure judicial approval before a commitment could be made.[37] The king contended that "the law of the land" was a general phrase, not limiting his powers in any definite specific manner, while the commons viewed

English Constitution, pp. 187-202; J. Toulmin Smith, Government by Commissions, pp. 127-142.

[33] Adams, Constitutional History, p. 291.

[34] *Ibid.*, pp. 292, 293.

[35] Gneist, History of the English Constitution, Vol. II, p. 247.

[36] Cobbett, Parliamentary History, Vol. II, pp. 262-265. These events leading up to the Petition of Right are also printed in "Proceedings in Parliament relating to the Liberty of the Subject," 3 Howell State Trials, pp. 59-234. See also F. H. Relf, Petition of Right (Minnesota Studies in Social Science, No. 8, Minneapolis, 1917).

[37] Cobbett, Parliamentary History, Vol. II, p. 328.

it as a particular protection against just such an abuse as the case of the Five Knights.[38] In spite of the fact that the king finally agreed to proceed according to the common law in all cases within its purview, the Commons wished it to be a matter of record,[39] and in spite of the protest of certain members,[40] a committee was appointed, Coke being the leading member,[41] to draw up the Petition of Right. This famous document may be regarded then as the first great official interpretation of Magna Carta since the time of Edward III,[42] and was essentially an attempt to apply in a practical manner the definitive content which the great commentator had given to at least a portion of the guarantee of due process of law.

As a result of the Petition of Right there seemed to be a general revival of the idea that due process of law granted protection from arbitrary, extraordinary, or illegal arrests. In the Ship-money Case it was declared by the prosecution that it did not cover arrests for refusal to pay taxes imposed by the king.[43] The act abolishing the Court of Star Chamber declared that the procedure in that body had not been "due process of law" and was contrary to the "law of the land."[44] Captain John Streater

38 *Ibid.*, pp. 293-328.

39 *Ibid.*, p. 330.

40 It was at this point that Sir Benjamin Rudyard made his famous remark: "For my own part, I shall be very glad to see that good, old decrepid law of Magna Carta, which hath been so long kept in and lain bed-rid as it were; I should be glad, I say, to see it walk abroad again with new vigour and lustre." Cobbett, Parliamentary History, Vol. II, p. 335.

41 Francis Lieber, Civil Liberty and Self Government (Philadelphia, 1853), p. 486.

42 5 Statutes of the Realm, p. 23; Adams and Stephens, Select Documents, p. 339. See ch. I, sec. 3.

43 Hampden was charged with the failure to pay the ship-money which had been levied by order of the king. Sir John Banks, the attorney for the Crown declared that the general words of ch. 29 (39) of Magna Carta do not impeach the royal power to levy and enforce the collection of such monies. John Hampden's case, 3 Howell State Trials (1637), pp. 825, 1052. See also Rushworth, Historical Collections, Vol. II, appen., p. 162.

44 All the traditional statutes from Magna Carta to the 42 Edward III, ch. 1, are recited together with the act establishing the Court and it is complained that "the said judges have not kept themselves to the points

claimed that under Magna Carta he was protected from arbitrary arrest by the House of Commons, but found that his argument fell on the deaf ears of a prejudiced court.[45] These cases illustrate the fact that there was growing up the legal doctrine that, aside from an act of parliament and a few other special cases, no one could be brought to trial but by regular judicial indictment.[46] The question of the legality of indictment by information arose in connection with a riot case in 1691. Chief Justice Holt laid down the rule that unless the information prejudiced the rights of the accused at the trial it was a valid method of proceeding for what was protected by the Petition of Rights was some kind of presentment but not any particular kind of presentment.[47] Indeed the concept of a

limited by the said statute, but have undertaken to punish where no law doth warrant" and that "the Council Table hath of late times assumed unto itself a power to intermeddle in civil causes and matters only of private interest between party and party, and have adventured to determine of the estates and liberties of the subject, contrary to the law of the land and the rights and privileges of the subject." 5 Statutes of the Realm (1641), p. 110; Adams and Stephens, Select Documents, p. 363 at 364, 365.

[45] Captain John Streater's Case, 5 Howell State Trials (1653), p. 366.

[46] Blackstone, Commentaries, Vol. I, pp. 135-139. "And by a variety of ancient statutes it is enacted that no man's lands or goods shall be seized into the king's hands, against the great charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if anything be done to the contrary it shall be redressed and holden for none." *Ibid.*, Vol. I, p. 139.

[47] Mr. Prynn's Case. In this case the defendants were proceeded against by an indictment of information for causing a riot and pulling down the fences on Mr. Prynn's property. They demurred on the ground that such proceeding was illegal. Sir F. Winnington in support of the demurrer contended that indictment by information was contrary to the common law and in support of his view cited a number of authorities among which are Magna Carta c. 39, and the Petition of Right; Glanvil ch. 1; Fleta lib. 2, c. 52, fol. 112, 113; Coke's Institutes, etc. He likewise claimed that indictment by information was abolished with the abolition of the Court of Star Chamber. On the other hand, Sir Bartholomew Shower, counsel for the crown, declared that such a method did not violate due process of law for it had been the universal practice in all ages. What due process protects, he contended, was a fair hearing in which there would be no punishment without a regular trial and the Petition of Right merely transferred this power of indictment by information from the King to the courts. The court concurred in this latter view and after two long sessions on the case Chief Justice Holt rendered the opinion, that, in as much as there were no precedents against indictment by information,

legal form of criminal procedure demanded by due process of law is without doubt the law of England today, although no particular process is guaranteed.[48]

§ 30. While it is evident that the English conception of due process has always revolved around the idea of criminal procedure in one form or another according to the legal conceptions of the period, there has likewise been intermittent stream of statements which indicate that the chapter is broader than frequently has been thought. The struggle between the Stuarts and Parliament and the period of the Commonwealth brought out a great many ideas of government, some new and some old.[49] Among these we find scattering statements and intimations that due process was a guarantee against injustice and general illegality as well as against specific abuses of criminal procedure. Occasionally it was the representatives of the king who contended that the meaning of the "law of

and in as much as it had been done at common law, and in as much as it protected the freedom of pleading for the accused, it was not contrary to Magna Carta and was "due process of law." Mr. Prynn's Case, 5 Mod. (1691) 459; Holt (K. B.) 362; King v. Berchet et al., 1 Show. (K. B.) 106; King v. Abraham et al., 1 Show. (K. B.) 49; Comb. 141; Holt (K. B.) 361.

[48] Joseph Chitty, Criminal Law (London, 1816), Chitty declares that "process" as used in this connection "signifies the writs and judicial means by which a man is brought to answer." Pages 337, 338. But he makes it equally clear that such process may be "due process" even though a person is not indicted by grand jury. Page 12. There is a close connection between the English doctrine in this matter and the rule laid down in Hurtado v. California, 110 U. S. (1884) 516, 28 L. ed. 232.

Toulmin Smith appropriated the arguments of the seventeenth century in this connection also. In contending that summary jurisdiction which had been given the judges was unconstitutional he quoted article thirty-nine of Magna Carta and then paraphrased it as follows:

"Every man, says the theory and practice of Summary Jurisdiction, shall be amerced at the arbitrary discretion of Crown-appointed irresponsible functionaries: any freeman may be taken, or imprisoned, or disseised, or outlawed, or banished, or in any wise destroyed by judgment passed upon him without any appeal to his fellow-freeman, but at the arbitrary discretion of functionaries set over him. The only 'Law' is to be the judge-interpreted, that is judge-made, Law ... Truly is it 'the Law of Tyrants.'" Toulmin Smith, Local Government and Centralization, pp. 272, 273. See also pp. 284, 287.

[49] These are summarized in Jenks, Constitutional Experiments.

FORDHAM UNIVERSITY LIBRARY

the land" was general and should not be pinned down to particular matters for it included vastly more than trial by jury or indictment by grand jury.[50] More often, however, it was the opponents of arbitrary power who demanded a wider connotation for the words of Magna Carta. It was perhaps this feeling on the part of many of the Commons that led to a transcription of the thirty-ninth article into the Petition of Right rather than a mere paraphrase of it.[51] Some considered that this section protected them from arbitrary action in whatever form it appeared,[52] while others thought that it summed up the rights of Englishmen with regard to life and property.[53] Locke's suggestion that the power of the

[50] Thus in the Conferences on the Liberty of the Subject held in 1628, Sergeant Ashley declared "The words in the statute, per legem terrae, cannot be restrained to so narrow bounds as to imprisonment by process; wherefore I do positively, and with confidence affirm, That if the imprisonment be lawful, let it be by process, or without process, it is not prohibited by this law." Page 316. He continued by showing that the law of the land included ecclesiastical, admiralty, martial, merchant and common law as well as "the law of the state; when the necessity of the state required it." Page 318. Cobbett, Parliamentary History, Vol. II, pp. 263, 293, 310, 311. Sir Shower used a similar argument in Mr. Prynn's Case, 5 Mod. (1691) 459; Holt (K. B.) 362; King v. Berchet et al., 1 Show. (K. B.) 106; King v. Abraham et al., 1 Show. (K. B.) 49; Comb. 141; Holt (K. B.) 361.

[51] This is shown by the argument of Mr. Mason in the House of Commons when the question of a committee to frame the Petition of Right was under discussion. He declared that to abridge or explain Magna Carta might result in leaving some of its meaning out. Cobbett, Parliamentary History, Vol. II, pp. 341, 342. Note also the wording of the Petition of Right which followed very closely its model. 5 Statutes of the Realm, p. 23; *supra,* sec. 3.

[52] Prynne used it in arguing against the royal veto. William Prynne, Good Old Fundamental Liberties, Part II, p. 74, cited in McIlwain, High Court of Parliament, pp. 65, 66. See also the views of Coke, in the Institutes, Vol. II, p. 50 ff.; Twysden, Government of England, pp. 174-180.

[53] The law of the land means "nothing else but those immunities the subject hath ever enjoyed as his owne right, perteyning either to his person or his goods; and the grownd that hee doth so is that they are allowed him by the law of the land." Twysden, Government of England, p. 82.

Chapter thirty-nine of Magna Carta "is a comprehensive Law, and made up of many Saxon Laws; or rather an enforcement of all Laws, and a remedy against oppression, past, present and to come .... I think it needless to shew how this was no new Law, but a confirmation of the old, and reparation added thereto, being much impaired by stormy times; for the sum of all the foregoing discourse tendeth thereto." Nathaniel Bacon, Historical and Political Discourse of the Laws and Government of England,

Legislature should not extend to the issuance of extemporary decrees, special or partial laws, or laws which are against the "law of Nature" is very closely akin to the modern concept, if not to the original meaning, of due process of law.[54] Because of the divergence of opinion regarding the meaning of this protection, there was a demand on the part of some for a restatement of it in more precise language as late as the very close of the Seventeenth Century,[55] while others saw in this ambiguity a chance to use it effectively in a party platform.[56]

"Collected from some manuscript notes of John Selden, Esq., by Nathaniel Bacon, London, 1739, first edition London (1649), p. 170." See also James Tyrell, *Bibliotheca Politica* or an Enquiry into the Antient Constitution of the English Government (London, 1727, first ed. London, 1718), pp. 132, 223, 224, 468.

54 The entire chapter on the "Extent of Legislative Power" seems to be a restatement in the terms of abstract philosophy of the ideas which are bound up in the meaning of the "law of the land." It is significant, however, that Locke did not link these views up directly with Magna Carta. He was not writing a legal statement but rather a philosophical discourse. Locke, Two Treatises of Government, Part II, ch. XI, secs. 134-142.

There have been a number of other statements relative to the "Law of Nature" which suggest ideas closely akin to "due process." "That our Law is founded upon Reason; and indeed it would be a strange Law if it was not, seeing the very essence of all Law consists in such a right Reason, as commands things honest, and prohibits the contrary; and is of divine Extraction, as hath been already shewed. As to the second ground, viz. the revealed Will of God, it is most certain, that whatsoever Edict or Command is repugnant to it, is *ipso facto,* void and no law at all." George Dawson, Treatise of the Origin of Laws and Their Obliging Power (London, 1694), pp. 84, 85. See also Tyrell, *Bibliotheca Politica,* pp. 630, 631.

The influence of Locke is clearly shown in the debate in the House of Lords on the Repeal of the Stamp Act (Feb. 10, 1766). There is no direct mention of Magna Carta nor of due process of law in this debate, but the indirect references to these were the basis for many of the remarks of Lord Camden.

"The sovereign authority, the omnipotence of the Legislature, my lords, is a favourite doctrine, but there are some things they cannot do. They cannot enact anything against the divine law, and may forfeit their right. They cannot take away any man's private property without making him a compensation. A proof of which is the many private bills, as well as public, passed every session. They have no right to condemn any man by bill of attainder without hearing him." T. C. Hansard, Parliamentary History of England (London 1813), Vol. XVI, p. 168. In another speech the same day Lord Camden devotes nearly half of his time to quotations from Locke and an eulogy of him. *Ibid.,* pp. 177-181.

55 Sir Bartholomew Shower, "Reasons for a new Bill of Rights," (1692) in Somers, Tracts, Vol. VIII, pp. 64-77.

56 In a "Declaration from his Majesty the King of Scots," written to

Throughout English constitutional development there was, then, an undercurrent of thought that the traditional and specific interpretations of Magna Carta did not cover the entire field and there were wide ranges of protection within that revered document which had never been explored. Some looked at the specific protections from one angle and others looked at them differently while many did not see that in addition there was a residue of malleable bullion which could be molded as conditions demanded. But that some did conceive of such an interpretation is significant in showing the role which "due process of law" played and was to play in the English constitution. Under the flexibility of that system it acquired some new meaning with each important constitutional crisis in the development of individual liberty, and more than any other protection Magna Carta chapter thirty-nine was invoked by those who felt their rights threatened,[57] and with each successive exercise of this arm of liberty it gained both in effectiveness and ultimate potential value.

secure support in England while he was still in exile some time before the Declaration of Braeda, it is declared:

"4. That not any of our Subjects shall be burdened with Taxes, Excise, Free-quartering, or other illegal Payments or Pressures, or any Oaths imposed, nor any debarred of their Liberties, questioned for their Lives or Estates, for any Cause or Pretense Whatsoever, but by the ancient and known Laws of the Land, according to Magna Carta, and the Petition of Right." Somers, Tracts, Vol. I, p. 161.

[57] Toulmin Smith even went so far as to declare that Magna Carta and the common law prohibited Parliament from creating special commissions with powers over such things as drainage and public health because this be conceived to be a delegation of legislative power. Toulmin Smith, Government by Commissions, p. 248 and *passim;* Local Government and Centralization, p. 108.

PART THREE.

DUE PROCESS IN THE AMERICAN COLONIES.

CHAPTER VI.

THE FUNDAMENTAL LAW IN THE COLONIES.

§ 31. The salient fact in the legal development of the colonies is the gradual and continual evolution from a simple untechnical equity to the complex substantive and procedural rules of the English common law. The aim of the early colonists was to dispense equity with as few technicalities as was possible.[1] The new country, the religious bent of many of the colonists, the influence of the ideas of natural law, and the lack of professional lawyers all conspired to this end. But, as the country grew socially and economically the judges found it increasingly desirable to adopt the safeguards which the old world had found necessary to prevent frequent miscarriages of justice. By 1770 the technical rules of the common law had come into their own.

The colonists had acquired their knowledge of the common law through two channels. In the first place, a very considerable number of the young men in the colonies studied in the Inns of Court at London. No less than 128 Americans journeyed to England to complete their legal

1 P. S. Reinsch, English Common Law in the Early American Colonies (Madison, 1899).

education between the years 1681 and 1776. Among this number are to be found some of the most influential men in the colonies both during the Revolutionary period and the critical years which followed it.[2] The course of study which these students pursued seems to have been not entirely satisfactory and many of them supplemented it by practical work in the offices of solicitors[3] and by visiting court.[4] The books studied were the old classics of the law, especially Coke, and the inferior simplifications of them.[5] It is but natural, therefore, that the Americans who studied at London should return to America with a great reverence for Coke and his school.[6]

The second channel by which the colonists acquired their legal information consists of the steady stream of books which they imported from England. These were of various kinds, and perhaps one of their most striking characteristics was the great variety of titles which have been listed in the records of colonial libraries and cited in the law reports by colonial advocates and judges.[7] Side by side with the great standard works of authority which had been produced in England during the Seventeenth Century, we find in the colonies many older works which were fast becoming antiquated in England. Not only were the works of Fitzherbert, Littleton, Saint Germain, and Brooke known to the colonists, but even the more ancient Fleta, Glanvil, Bracton, Britten and Horne were used. At

[2] The list of those studying at Middle Temple is given by C. E. A. Bedwell. It includes the names of at least five signers of the Declaration of Independence and six members of the Constitutional convention of 1787. "American Middle Templars," American Historical Review, Vol. XXV (July, 1920), pp. 680-689. See also the biographies of these men in E. A. Jones, American Members of the Inns of Court (London, 1924).

[3] Charles Warren, History of the American Bar (N. Y., 1912), pp. 153-155.

[4] *Ibid.*, pp. 189, 190.

[5] *Ibid.*, pp. 151, 152, 193, 194.

[6] Blackstone laments the backwardness of the Inns of Court. William Blackstone, Commentaries on the Laws of England (London 1765), Vol. I, p. 32.

[7] Records have been left in two places of some fifty titles.

the same time the colonies were flooded with semi-popular "epitomes" of the law which purported to make a skilled practitioner of anyone who would give them a cursory reading.[8]

Another conspicuous fact was the tremendous influence of Sir Edward Coke. Not only were his writings found more often in the colonial libraries than the books of any other authority on either law or politics,[9] but he is cited more frequently in the cases than is any other authority.[10] But Coke's influence did not stop with the direct spread of his writings, for we find in the colonies a wide circulation given to other authorities which were based quite largely, if not entirely, upon the Institutes. On the other hand, however, the new school of English Law, repre-

[8] The following titles are suggestive of this type of book: Dalton, Countrey Justice; Lilly, Practical Register, Practick Part of the Law; Godolphin, Orphan's Legacy; Sheppard, Touchstone of Common Assurance; Jacob, Every Man his Own Lawyer; Forster, Laymans Lawyer; Sheppard, Marrow of the Law, Epitome of the Law; Baron and Feme; etc.

[9] The published inventories of forty-seven colonial libraries have been examined. The inventories were made between the years 1652 and 1791. The following works were found in the number of libraries indicated.

Coke, Institutes and Commentaries on Littleton	27
Grotius, War and Peace	16
Les Termes de la Ley	14
Dalton, Countrey Justice	13
Locke, Two Treatises on Government	13
Practick Part of the Law	12
Puffendorf, Law of Nature and Nations	12
Cicero, Works	11
Fitzherbert, Natura Brevium	11
Swinburne, Wills	11

[10] Authorities are cited in 228 cases decided in the colonial courts before 1776. The following were most frequently cited:

Coke, Institutes and Commentaries on Littleton	294
Bacon, Abridgment	172
Viner, Abridgment	105
Rolle, Abridgment	97
Brooke, Abridgment	33
Hawkins, Abridgment	32
Gilbert, Evidence	31
Littleton, Tenures	30
D'Anvers, Abridgment	26
Blackstone, Commentaries	24
Gilbert, Ejectment	24

It is noteworthy that Coke was cited on the average of more than once per case.

sented by Blackstone, was rapidly securing a foothold. The Commentaries were published only eleven years before the American Revolution but by 1776 they had been reprinted in two American editions.[11] However, the fact stands out clearly that Coke and his school were by far the more influential in American legal thought before the Revolution. One is not surprised, likewise, to find that in the realm of political theory the authority of John Locke and the leaders of the Whig revolution of 1688 was practically unchallenged. It would seem, then, that as regards both law and political science, colonial thought in the middle of the eighteenth century was very similar to English thought at the end of the seventeenth century.[12]

§ 32. As has already been pointed out[13] the concept of a fundamental constitutional law which even Parliament could not override had seen its hey-day in England under the influence of Coke in the seventeenth century. This doctrine fell upon very fertile soil in America. From the very beginning the colonists had claimed the great body of common law rights and time after time these had been granted them in royal patents and charters.[14] The colonial assemblies were usually given legislative power only on the condition that the acts passed were not contrary

[11] Isaiah Thomas, The History of Printing in America (Transactions of the American Antiquarian Society, Albany, 1874, Vols. V, VI), Vol. II, pp. 615, 622, 641. Edmund Burke declared in Parliament that as many copies of Blackstone were sold in America as in England. Hannis Taylor, Origin and Growth of the American Constitution (N. Y., 1911), pp. 79-82.

[12] A study of the reports cited in colonial cases shows clearly that the colonists were relying largely on those of the seventeenth century. Here again Coke leads the list. In this respect, as in all points regarding colonial use of English legal and political literature, I have followed the results of an unpublished monograph entitled "Books on Law and Political Science in the Colonies" written by the author in January, 1922.

[13] Section 20.

[14] M. A. Hazeltine, "Influence of Magna Carta on American Development" (Henry Elliot Malden, Magna Carta Commemoration Essays, London, 1917), pp. 184-187; Edward Channing, History of the United States (N. Y., 1905), Vol. I, pp. 174, 175, 529; William MacDonald, Select Charters and other Documents Illustrative of American History, 1606-1775 (N. Y., 1904), pp. 1-11.

to the laws of England[15] and not infrequently the governors were instructed to veto legislation which conflicted with those laws.[16] Furthermore, the power of disallowance which the Privy Council exercised over colonial laws tended to impress upon the colonial lawyers the fact that the fundamental law, of which Coke and his associates had written, was far from being a fiction, but rather was a reality of the sternest sort.[17] Over against the claim of the royal officials that the colonial legislatures were inferior to Parliament and hence their acts were subject to greater supervision,[18] the colonists maintained that within the sphere of local concern their acts were as supreme as those of the imperial legislature. This, however, did not mean absolute supremacy, even in the colonies; for they applied the same reasoning to the colonial legislatures that Coke had applied to the British Parliament in the earlier period, sometimes even citing Dr. Bonham's Case as a precedent.[19]

The position which Magna Carta occupied as a part of this fundamental law is significant. From the earliest times the term "Magna Carta" was used generically for

15 Hazeltine, Influence of Magna Carta (Malden's Essays), pp. 190, 191.

16 For example see the instructions of Governor Bernard of New Jersey, 1758, sec. 35, reprinted in E. B. Greene, The Provincial Governor in the English Colonies of North America (N. Y., 1898), p. 245.

17 The Colonial forerunners of judicial review have been reviewed in a number of books. Edward Corwin, The Doctrine of Judicial Review and other Essays (Princeton, 1914); Brinton Coxe, Essay on Judicial Power and Unconstitutional Legislation (Phila., 1893); Charles Grove Haines, The Doctrine of Judicial Review (N. Y., 1914); A. C. McLaughlin, The Courts, the Constitution and Parties (Chicago, 1912).

18 Such was the claim of C. Pratt, Attorney General of Maryland, Attorney General P. Yorke, and Solicitor General C. Talbot. George Chalmers, Opinions of Eminent Lawyers on Various Points of English Jurisprudence, Chiefly Concerning the Colonies, Fisheries and Commerce of Great Britain (London, 1814), Vol. I, pp. 262-266, 353, 354. Note also the views of Attorney General Murray and Solicitor General Lloyd of Jamaica. *Ibid.*, Vol. II, pp. 1-3.

19 See particularly the argument of the attorney for the defendant in Churchill v. Blackburn, Randolph (Va., 1730) 26; the argument of the attorney for the plaintiff in Jones v. Porters, Barradall (Va., 1740) 93 at 99; the argument of the attorney for the defendant in Knight v. Triplett, Barradall (Va., 1740) 127 (citing Jones v. Porters); argument of Mason for the plaintiff, Robin et al. v. Hardaway et al., Jefferson (Va., 1772) 109 at 114. *Contra*, Bishop v. Brig Freemason, Quincy (Mass., 1763) 387.

any written document of fundamental importance.[20] It seems that the colonists had but the faintest ideas of the contents of the document granted by King John until Penn published his edition of it in 1687 and the English law books began to pour into America during the eighteenth century.[21] Some were at least familiar with the substance of the famous thirty-ninth chapter but few knew its exact wording. By the time of the Revolution, however, copies of the Great Charter were very common. Many of the colonists had copies of either law treatises[22] or compilations of statute law which contained it;[23] and by the time of the Revolution it was published even in the almanacs.[24] It was undoubtedly better known in the colonies than was any other English statute, and there can be no doubt that

[20] Thus in 1638 the people of Massachusetts desired a Body of Liberties like a Magna Carta. (H. L. Osgood, American Colonies in the Seventeenth Century (New York, 1904), Vol. I, pp. 180, 181). And the instructions given to Lord De la Warr in April, 1618, and renewed by Sir George Yeardley were called by the Virginians "our Magna Carta," Alexander Brown, The First Republic in America (Boston, 1898), p. 266; Alexander Brown, English Politics in Early Virginia History (Boston, 1901), pp. 29, 162. These instructions contained none of the provisions of the charter granted by King John in 1215. "Instructions to Governor Yeardley, 1618," Virginia Magazine of History and Biography, Vol. II (Oct., 1894), pp. 154-165. Likewise the people of North Carolina regarded "the Great deed of Grant" as a sort of Magna Carta. Hazeltine, "Influence of Magna Carta on American Development" (Malden's Essays), pp. 199, 200.

[21] *Supra*, sec. 5; *post*, secs. 36 and 39.

[22] Coke's Institutes and Commentaries on Littleton contained copies of the Great Charter. See n. 9. There were also at least six copies of Henry Care's English Liberties in colonial libraries. Indeed this work was reprinted in Boston in 1721. Thomas, History of Printing, Vol. II, p. 388.

[23] There were at least seven of these compilations that contained the name "Magna Carta" in the title to be found in colonial libraries. There were at least five other copies of the Great Charter available in other editions of statutes.

[24] The following advertisement in the Supplement to the Massachusetts Gazette of Nov. 5, 1767, illustrates this: ". . . sold by John Mein, at the London Book-store, North-side of King-street, Boston . . . Bickerstaff's Boston Almanack, for the year of our Lord, M. Dcc, LXVIII Being Bisextile or Leap Year . . . Containing . . . a chronological Table of the Discovery of the Arts and Sciences, interspersed with remarkable Events since the Deluge. This Table contains more particularly everything of moment that happened in Great Britain and the Colonies, Viz, an Account of Magna Charta, which is our most antient written law, of the Famous English Statute called Declaration of Rights, or New Magna Charta, enacted immediately after the Revolution, by their Majesties William and Mary, to be a Law of the Realm forever. . . ."

it was considered more fundamental than any other. Certainly in times of constitutional stress the colonists did not hesitate to make use of it to buttress their position. In the century and three-quarters before the American Revolution it was referred to and its protection was invoked in nearly every one of the colonies. An investigation of these incidents will show that the due process provision was cited more often than any other, and that it was, indeed, considered the heart of the venerable document.

§ 33. In New England the first constitutional struggle which involved "due process of law" grew out of discretionary power wielded by the magistrates in Massachusetts Bay colony,[25] and the general movement to extend the right of participation in the government. Between the years 1634 and 1635 the general court passed a great many laws on such trivial subjects[26] that there was a demand for a fundamental law "in resemblance to a Magna Carta." Committees were appointed, drafts of proposed fundamental laws were made and considered, and in 1641, after three years of discussion and revision, the Massachusetts Body of Liberties was adopted.[27] The first article of this document[28] was a rather liberal paraphrase of the thirty-ninth section of Magna Carta.[29] The wording would

[25] H. L. Osgood, American Colonies in the Seventeenth Century (N. Y., 1904), Vol. I, p. 180.

[26] W. H. Whitmore, ed. The Colonial Laws of Massachusetts (Boston, 1899), Vol. I, pp. 3, 4.

[27] John Winthrop, History of New England (ed. by J. K. Hosmer, N. Y., 1908), Vol. I, p. 151; *Ibid.* (ed. by James Savage, Boston, 1853), Vol. I, p. 191, Vol. II, p. 66; Whitmore, Colonial Laws of Massachusetts, Vol. I, pp. 3-33; N. B. Shurtleff, ed. Records of the Governor and Company of Massachusetts Bay in New England (Boston, 1853), Vol. I, pp. 147, 174 (150, 176); F. C. Gray, Remarks on the Early Laws of Massachusetts Bay; with the Code adopted in 1641, and called The Body of Liberties, now first printed, Collections of Massachusetts Historical Society (Boston, 1843), Series III, Vol. VIII, pp. 192-195.

[28] Whitmore, Colonial Laws of Massachusetts, Vol. I, pp. 1-9, contains a careful textual criticism of this document. A statement of the discovery of the "Body of Liberties" by modern historians, together with a reprint of it and the pertinent parts of Winthrop's Journal and the Massachusetts Colonial Records is to be found in F. C. Gray, Early Laws of Massachusetts Bay, Collections of Massachusetts Historical Society (Boston, 1843), Series III, Vol. VIII, pp. 191-237.

[29] See *supra* sec. 4, n. 31.

indicate that it was intended that there should be no limitation upon the legislative power, and that it merely required that the law be published, or found in the scriptures, before a man might be punished under it. However, such a loose rendering of the Great Charter did not completely satisfy all the elements which had demanded a fundamental law, and there shortly developed a demand for additional codification in order to insure greater regularity in the administration of justice.[30] In spite of John Winthrop's attempt to prove that the government of Massachusetts Bay was far from being arbitrary,[31] it was complained that the general court did not keep the fundamental laws of England or the colonies.[32] The general court answered that they would only make laws which were conformable to the fundamental laws and liberties of the commonwealth,[33] and appointed another committee to compare the Body of Liberties with Magna Carta and

[30] Osgood, American Colonies, Vol. I, pp. 193-195.

[31] It was for this purpose that he wrote his tract (1644) "Arbitrary Government Described: & and Government of the Massachusetts Vindicated from that Aspersion." He contended that any government conducted according to law was not arbitrary. He pointed out that the due process provision in the Body of Liberties insured that the government of Massachusetts was according to law, i. e., The fundamental "Rule is the Worde of God, & such conclusions & deductions, as are, or shall be, regularly drawne from thence." Page 445. This provides adequate safeguards if it is coupled, as in the Body of Liberties, with "suche a generall Lawe made (as in Magna Charta) that may prevent the overthrowinge of mens estates, or lands, etc., by ffines, etc. (and I think it as needfull, as any Lawe or Libertye we have), whereby the Iudges may be restrayned, within certaine limitts, which (if occasion should require, to exceede), may be referred to the Generall Court." Page 450. Robert C. Winthrop, Life and Letters of John Winthrop (Boston, 1869), Vol. II.

[32] Dr. Robert Child and Mr. Samuel Maverick were the leading rebels. With five other freemen of the town they petitioned the general court for additional guarantees and threatened to carry their demands to England. Osgood, American Colonies, Vol. II, p. 260; Thomas Hutchinson, History of the Colony of Massachusetts Bay (2d ed., London, 1760), Vol. I, pp. 145-149.

[33] "Answers of the Reverend Elders to Certeine Questions Propounded to them. . . .

"The Generall Court, consisting of ye magistrates and deputies, is ye Cheife civill power of ye comonwealth, so as to describe ye power of ye magistracy, & to prescribe (in a civill way) lawes unto all not repugnant to ye lawes of God, nor to ye patent, nor to ye fundamentall laws & liberties established in ye comonwealth. . . ." Shurtleff. Records of Massachusetts Bay, Vol. II, pp. 94, 95 (74).

the English common law.[34] This committee reported that some nine provisions of Magna Carta were, in one way or another, incorporated into the Body of Liberties. The emphasis which they placed upon the thirty-ninth article indicated, likewise, that they considered it as being by far the most important of the provisions.[35]

§ 34. The most striking thing about the whole incident of the Body of Liberties was the fact that it was drawn up and interpreted in answer to a positive demand, not only that the judges should not act in an arbitrary manner, but also that administrative officials and subsequently even the legislature, should be restrained in their actions. No evidence has been discovered in the cases of Connecticut and Rhode Island to indicate that they ever got further than the first of these stages. Both of these colonies prefixed to their early codes of laws paraphrases of a portion of Magna Carta,[36] and in the case of Connecticut it is obvious that the provision of the Body of Liberties was copied bodily.[37] Indeed it was objected that this provision

[34] Winthrop was a member of this committee. Osgood, American Colonies, Vol. I, p. 260.

[35] They also found counterpart for some twenty-nine provisions of the common law in the laws of Massachusetts. The first provision in the Body of Liberties is said to contain in substance what was contained in the twentieth and thirty-ninth sections of Magna Carta. "No man shall be condemned but by lawfull tryall; Justice shall not be sould, deferred nor denyed to any man. All mens liberties and free customes shall be reserved." The committee admitted that the colonists were ignorant of the wording of the laws of England but declared "If we had able lawyers amongst us, we might have beene more exact." "The Hutchinson Papers," Publications of the Prince Society (Albany, 1865), Vol. I, pp. 223-247 (197-218).

The following order of the General Court was probably the outgrowth of the difficulty. "It is agreed by this courte, to ye end we may have the better light for making & proceeding about laws, it shall be these books following procured for ye yuse of ye court from time to time:—

"Two of Sir Edward Coke upon Littleton; two of ye Books of Entryes; two of Sir Edward Coke upon Magna Charta; two of ye Newe Tearmes of the Law; two Daltons Iustice of Peace; two of Sir Edward Coke's Reports." Nov. 11, 1647. Shurtleff, Records of Massachusetts Bay, Vol. II, p. 212 (183).

[36] See sec. 5.

[37] J. H. Trumbull, Public Records of the Colony of Connecticut (Hartford, 1850), Vol. I, p. 509. This provision does not appear in the earlier laws of 1642. *Ibid.*, Vol. I, pp. 77, 78. The provision in the Code of 1650 is an almost exact copy of that of Massachusetts. Trumbull gives the word-

was not strong enough, for it did not limit the general court in the exercise of arbitrary power.[38] From the Rhode Island provision (1647) it is very evident that there was no conception that this declaration was to be a limit upon the legislative power.[39]

§ 35. During the Cromwellian revolution the English government had paid little attention to the problem of colonial administration. The colonies went their own way with little or no restraint and the governors sent over during this period were not especially vigorous in the protection of the interests of the mother country. Toward the end of the century, however, a marked change appeared. The revocation of colonial charters, the consolidation of the northern colonies under a single governor, and the increasing activity of the Privy Council in an-

ing as amended. Originally the words were added: "case, by some clear and plaine rule of the word of God, in which the whole court shall concur." This was changed in 1750 to read "or in case of defect of such law in any particular case, by some clear and plain rule warranted by the word of God." In 1784 all reference to the word of God was omitted. (Gershom Bulkeley) "Will and Doom, or the Miseries of Connecticut by and under Usurped and Arbitrary Power." (Ed. by C. J. Hoadly.) Collections of the Connecticut Historical Society (Hartford, 1895), Vol. III, pp. 106, 107, n. by Hoadly. Public Statute Laws of the State of Connecticut (Hartford, 1806), Vol. I, p. 24.

[38] Bulkeley complained that English law was not enforced in Connecticut. "And in the first place, they enact a new Magna Charta for Connecticut; . . ." Cites the paraphrase of the thirty-ninth article from Ludlow's Code, p. 106.

"By this law all the law of England (common, or statute, or other), is exploded at once; it can neither hurt nor help us, unless it receive a new sanction from this general court. Verily the king and the parliament have met their match. All the law and authority in England can not hang a traitor in Connecticut." Page 107.

"Men are strangely put out of their lands and inheritances without due process of law." Page 226.

Summary seizure for failure to pay taxes "is imprisonment inflicted by a (pretended) corporation law (which is not the law of the land) without a *mittimus,* and at the pleasure of their authority, which consequently may be perpetual if they will. . . ." Page 213.

The power of the general court is an arbitrary uncontrolled power under the Connecticut system. Page 129. Gershom Bulkeley "Will and Doom," Collections of the Connecticut Historical Society, Vol. III, pp. 68-269.

[39] See the preamble to the general declaration of crimes and penalties. Ch. I, p. 10. J. R. Bartlett, ed. Records of the Colony of Rhode Island (Providence, 1856), Vol. I, p. 157.

nulling colonial statutes[40] were but external evidences of the general movement to bring all of the colonies more directly under English control.

That the movement was unpopular in the colonies was to be expected, and it is not surprising that great opposition arose to the increased administrative and executive powers of the governors. In almost every case this protest resulted in a demand for the protection of personal liberty and property which had been the English birthright under the common law. The King's instructions to his governors recognized the danger of arbitrary government and frequently contained statements that nothing should be done contrary to the thirty-ninth chapter of Magna Carta.[41] But the colonies refused to be satisfied with this and the demand persisted for a statement of the protection in the colonial law itself.

In 1692 the general court of Massachusetts Bay passed the Habeas Corpus Act and "An Act setting forth General Privileges" of citizens of the colony. The latter was in the nature of a Declaration of Rights,[42] and it included not only a modified statement of the law of the land provision from Magna Carta, but likewise the first use of the phrase "due process of law" which has been found in American documents.[43] The crown, however, feared that

[40] E. B. Russell, The Review of American Colonial Legislation by the King and Council, Columbia University Studies in History, Economics and Public Law, Vol. LXIV, No. 2 (N. Y., 1915), ch. I.

[41] "And wee do hereby require and command that no mans life member freehold or goods be taken away, but by established and known lawes, not repugnant to, but as much as conveniently may be, agreeable to the lawes of our Kingdom of England." Instructions for Sir Edmund Andros, Apr. 16, 1688. J. R. Brodhead ed. Documents Relative to the Colonial History of the State of York (Albany, 1853), Vol. III, p. 546.

"You are to take care that noe man's life, member, freehold or goods be taken away or harmed in our sd. province, but by Established & known Laws not repugnant to but, as much as conveniently may be, agreeable to the Laws of our Kingdom of England." Instructions to Governor Thomas Dongan of New York, May 29, 1686. Broadhead, New York Colonial Documents, Vol. III, p. 372.

[42] Chalmers said that it was "analogous to the Declaration of Rights in the constitution of this commonwealth" and for that reason it was numbered in sections. Acts and Resolves Public and Private of the Province of Massachusetts Bay (Boston, 1869), Vol. I, p. 10.

[43] Act of Oct. 12, 1692, sec. 1. "That no freeman shall be taken or im-

the colony, by means of these two acts,[44] might secure royal assent to some privileges which would later prove embarrassing in the administration of justice. Consequently both were disallowed.[45]

The colonial assembly of New York made two attempts to place this protection upon the statute books of the colony.[46] Here again the administrative authorities, colonial and English, blocked the efforts of the assembly.[47]

prisoned or be disseized of his freehold or libertys or his free customes, or be outlawed or exiled, or in any manner destroyed, nor shall be passed upon, adjudged or condemned, but by the lawful judgment of his peers or the law of this province."

Section 5. "No man, of what state or condition soever, shall be put out of his lands, or tenements, nor be taken or imprisoned nor disherited nor banished nor any ways destroyed, without being brought to answer by due process of law." This Act likewise provided that justice should not be sold, nor should any one be sentenced twice of the same offense. No taxes should be levied but by the general court, there should be trial by jury after an indictment by grand jury, bail should not be refused, and no attainder of blood should follow any sentence. Acts and Resolves of Massachusetts Bay, Vol. I, pp. 40, 41.

[44] The Habeas Corpus Act was passed Dec. 14, 1692. Acts and Resolves of Massachusetts Bay, Vol. I, pp. 95-99.

[45] The reasons given by the Committee on Trade and by the Lords of Justice for disallowing this law were largely based upon an anonymous paper presented to them under the title of "Observations upon the Laws." There was no specific objection to either of the sections providing for due process of law or the law of the land. Acts and Resolves of Massachusetts Bay, Vol. I, p. 41. In this paper the question was raised "Weither the Act setting forth Generall Privileges & therein reciting severall Clauses of Magna Charta be not needless, their majesties having under the great seal given his subjects here all the Lybertyes and Immunityes of the Natural subjects within any of his dominions and weither we do not show our ignorance or distrust of such their Majesties grant by this particularly offering and more weither the meaning of it be not as of old that their Majesties subjects shall not challenge any privilege, but which shall be found of our owne enacting least we should by any means be thought imediatly obliged to the Kings Grace for such privileges or our law books not found a perfect Independent body of Lawes." *Ibid.*, pp. 109, 110.

Sir John Somers advised the disallowance of the Habeas Corpus Act because the king had never conferred the right of that writ to the colonists "evidently regarding the guarantee of a speedy trial in Magna Charta as inapplicable to the colonial status." Edward Channing, History of the United States, Vol. II, p. 223, n. Acts and Resolves of Massachusetts Bay, Vol. I, pp. 95-99.

[46] In 1683, 1691, and 1697. See *supra* sec. 5, n. 35. J. S. Landon, Constitutional History of the United States (Boston, 1889), p. 24.

[47] Governor Dongan opposed the first attempt and although the Duke of York signed the act when he ascended the Throne a short time later as James II, he disallowed it. Osgood, American Colonies, Vol. II, pp. 163-168.

In none of these cases, nor indeed in the similar attempts in Massachusetts, is there any evidence that the colonists desired protection from legislative abuses. In fact, the preceding events and the wording of the proposed statutes seems to point the other way. Furthermore, the determined opposition of the governors, proprietor, and king to the acts show quite clearly that they did not look upon the declarations as legislative limitations.

§ 36. There was a similar movement in Pennsylvania very shortly after the colony was established. In the code which was drafted in 1683 there was an effort to establish due process of law as a part of the fundamental law of that colony[48] in a basic constitution which could be altered only by a six-sevenths vote of both assembly and council together with the consent of the governor.[49] The code thus drawn up was disallowed by William and Mary in 1693, but the venerable chapter from Magna Carta was reaffirmed in a Petition of Right which the lower house addressed to the Governor with the request that he govern the colony according to it.[50] The colonists, however, were not satisfied with a tacit understanding that justice was to be administered regularly and according to law. They wanted it enacted into the laws of the Province. Accordingly there followed, in the first two decades of the

In 1697 the governor exclaimed to the legislature in reply to their demand for a statement of their liberties, "There are none of you but what are big with the privileges of Englishmen and Magna Charta." Landon, Constitutional History of the United States, p. 24.

[48] "That no Freeman within this province of Pennsylvania or Territories thereof, shall be taken or imprisoned, or Dispossessed of his freeholds, or liberties, or be Outlawed, or Exiled, or any otherwise hurt, Damnified, or Destroyed, nor shall hee be tryed or Condemned but by the lawful judgement of his equalls, or by the Laws of this Province and Territories thereof." Ch. 64 of the Laws made by the assembly at Philadelphia, March 12, 1683. J. B. Linn, Charter to William Penn and Laws of the Province of Pennsylvania (Harrisburg, Pa., 1879), p. 127.

[49] Linn, Charter to William Penn, p. 154.

[50] This petition bears the date of 1693 and was addressed to Governor Benjamin Fletcher. Linn, Charter to William Penn, pp. 188-191, 204. The assembly claimed that since the king had not disallowed the law of 1683 within six months it was still valid. Minutes of the Provincial Council of Pennsylvania (1683-1790) (Phila., 1852, 1853), Vol. I, pp. 418-422.

eighteenth century, a number of acts declaring the privileges of citizens in the colony, each of which contained a provision similar to that in the earlier law.[51] Each of these acts met with serious opposition in the English Board of Trade, and in the end all were disallowed, the chief objections being that they not only were useless, but might actually interfere with the operation of the admiralty courts.[52] The colonists dropped the matter, but it is evident that their disappointment at the failure of the Board of Trade to approve the law was great. Even the attorney-general of Pennsylvania, a chronic objector to colonial laws, had made no objections to this provision, and William Penn appeared personally before the Lords of Trade in a vigorous defense of them.[53]

[51] Chapter XIX of the Act of Nov. 27, 1700, declared "That no freeman of this province or countries annexed, shall be taken, or imprisoned, or disseized of his freehold or liberties, or be outlawed or exiled, or any otherwise hurt, damnified or destroyed nor be tried or condemned but by the lawful judgment of his twelve equals, or by the Laws of this province and territories thereof." J. T. Mitchell and Henry Flanders, Statutes at Large of Pa. from 1682-1801 (Harrisburg, 1896), Vol. II, p. 18.

A similar act was passed with a saving clause that it should not obstruct the power of the admiralty courts in Feb., 1710. *Ibid.*, Vol. II, p. 359. This law, with slight textual changes, was reenacted in May, 1715. *Ibid.*, Vol. III, pp. 431-440.

[52] The Act of 1700 was objected to because it was feared that it might be contrary to the act (7-8 William and Mary) for preventing frauds and regulating abuses in plantation trade which had established the admiralty courts. Mitchell and Flanders, Statutes at Large of Pa., Vol. II, pp. 465-497.

The Act of 1710 met with resistance in spite of the saving clause exempting admiralty courts from its operation. Robert Raymond, the Solicitor General, reported unfavorably on this Act Dec. 22, 1713, because he feared that it still might interfere with the operation of those courts and "Besides," he declared, "I can't well see what occasion there is for this act, since by the laws already in being, the freemen are already entitled to all the privileges therein." *Ibid.*, p. 550.

The same reasons were assigned for the disallowance of the Act of 1715 which took place July, 1719. *Ibid.*, Vol. III, pp. 431-440. For an excellent discussion of the disallowance of Pennsylvania laws in general see W. T. Root, Relations of Pennsylvania and the British Government, 1696-1765 (N. Y., 1912), ch. 5.

[53] When it was objected that the Act of 1700 might interfere with the operation of the admiralty courts, Penn exclaimed, "I can not help it; 'tis the great charter that all Englishmen are entitled to, and we were not so far to lose a little of it." Aug. 31, 1705. Isaac Sharpless, History of the Quaker Government in Pennsylvania (Phila., 1898), Vol. I, p. 128; Mitchell and Flanders, Statutes at Large of Pa., Vol. II, p. 467.

Penn's memorial regarding the law of 1715 (dated Dec. 9, 1718), de-

Pennsylvania was no more successful in her attempt to write into the statute books a provision involving the traditional idea of Magna Carta than New York or Massachusetts had been. These laws were disallowed, however, not so much because the English government feared to extend to the colonists the rights of Englishmen, as because these acts were considered useless, inasmuch as the colonists were already entitled to the protection of the Great Charter, and the loose way in which the colonial statutes were drawn made them seem dangerous to the English lawyers. On the colonial side, there is again little evidence to support the view that the provisions were expected to restrict the legislature. We can not say that such was not the case, but it seems more probable that the colonists considered the provisions euphonious and so felt that they should grace any set of laws. If any particular abuses were in their minds, it is probable they were of an executive or judicial nature.

§ 37. The history of the Maryland colonial assembly was no less stormy than that of Pennsylvania. Before the middle of the seventeenth century at least four attempts were made to put on the statute book a provision guaranteeing the rights similar to those protected by due process of law.[54] In one instance an attempt was made to include

clared: "In this act nothing more is contained than what every Englishman enjoys by Magna Charta. Therefore, it is presumed the people of Pennsylvania (having done nothing to forfeit that) may have this act confirmed, more especially because it has been held by some that acts of parliament extend not to America unless it be expressly named in them." *Ibid.*, Vol. III, p. 447.

[54] March 16, 1637, "Act for the Liberties of the People." Proceedings and Acts of the Assembly, 1637-1664, Browne, Archives of Maryland, Vol. I, p. 20.

March 19, 1638, "An Act for the liberties of the people" was engrossed for third reading but it was never passed. It provided that freemen who were Christians were "to enjoy all such rights liberties immunities priviledges and free customs within this Province as any naturall born subject of England hath or ought to have or enjoy in the Realm of England by force or vertue of the common law or Statute Law of England (saveing in such cases as the same are or may be altered or changed by the Laws and ordinances of this Province).

"And shall not be imprisoned nor disseised or dispossessed of their

in a detailed explanation of the meaning of due process a saving clause to the effect that the legislature could pass any act notwithstanding the guarantee. The obnoxious proviso was deleted and a more general provision that the people should have their rights according to Magna Carta was substituted for the specific declaration.[55] Even this act was vetoed by the king on the advice of the attorney general, who feared that it might interfere with the royal prerogative in the colony.[56] Another series of struggles of this kind came in connection with the reflex of the revolution of 1688 upon colonial life. Maryland inserted in the first acts for the establishment of the Church of England riders guaranteeing the inhabitants of the colony the rights and privileges of Englishmen.[57] Serious objection was raised to these acts, however, both among the officials in the colony and in England, and they were consistently disallowed[58] until the assembly finally gave in

freehold goods or Chattels or be out Lawed Exiled or otherwise destroyed forejudged or punished then according to the Laws of this Province. . . ." The rights of the proprietary were to be saved and the act was to continue in force until the next assembly met. *Ibid.*, Vol. I, pp. 39, 41.

March 19, 1638, "Act ordeining certain laws for the Government of this Province." This law provided among other things "That the Inhabitants of this Province shall have all their rights and liberties according to the Great Charter of England. . . ." *Ibid.*, p. 83.

October 23, 1640. Act for the "Peoples Liberties" was passed by nine members. *Ibid.*, p. 94.

[55] The Act of 1638.

[56] Hazeltine, Influence of Magna Carta (Malden, Essays), pp. 195, 196.

[57] The acts are as follows:

1692. "An Act for the Service of Almighty God and the Establishment of the Protestant Religion within this Province.

"Bee it therefore Enacted by the King and Queens most Excellent Majestys by and with the advice & consent of this present Generall Assembly and the Authority of the same That the Church of England within this Province shall have and Enjoy all her Rights, Liberties and Franchises wholly inviolable as is now or shall be hereafter Established by Law, and also that the Great Charter of England be kept and observed in all points. . . ." Proceedings and Acts of the General Assembly of Maryland, 1684-1692. Brown, Archives of Maryland, Vol. XIII, pp. 425-430.

1696. The church was established and the following clause inserted in the act: "That his, Majesty's Subjects of this Province shall enjoy all their Rights and Liberties, according to the Laws and Statutes of the Kingdom of England, in all Matters and Causes, where the Laws of this Province are Silent." J. W. Thomas, Chronicles of Colonial Maryland (Baltimore, 1900), pp. 163-202.

[58] The Act of 1692 was disallowed because, as Solicitor General Trevor

and omitted the clause regarding the rights of citizens.[59] Another storm of protest arose in 1728, however, when the proprietary asserted that the people of Maryland were entitled to only so much of the English law as had been locally re-enacted.[60] The most important of protesting pamphleteers was Daniel Dulany, who not only claimed that the inhabitants were Englishmen and hence entitled to the benefits of English law, but also undertook to point out what were some of the more important of these rights. The epitome of the privileges of Englishmen was to be found in the thirty-ninth article of the Great Charter and its subsequent amplifications, which Dulany considered a summary of the entire common law protections.[61]

put it, "he knew not how far the enacting thereof will be agreeable to the constitution of this colony or consistent with the royal prerogative." George Chalmers, An Introduction to the History of the Revolt of the American Colonies (Boston, 1845), Vol. I, p. 259.

The governor did not approve of the Act of 1696 because it contained two subjects under one title, but after the assembly had offered to substitute "Laws and Statutes" for "fundamental Laws" (the wording as it was first passed) and added the phrase "Where the laws of this Province are Silent" he finally assented July 10, 1696. Throughout the controversy the assembly maintained that it was merely following the example of the English Parliament in confirming these rights. Proceedings and Acts of the Assembly, 1683-1697, Browne, Archives of Maryland, Vol. XIX, pp. 390, 415-418. However, the king disallowed this act on November 30, 1699, because "therein is a clause declaring all the laws of England to be in force in Maryland; which clause is of another nature than that which is set forth by the title of the said law." Thomas, Chronicles of Colonial Maryland, p. 167.

[59] The establishment act was finally passed March 25, 1702, being an amended version of the Act of 1700 changed to meet certain of the king's objections. It contained no provisions regarding the rights of citizens. Thomas, Chronicles of Colonial Maryland, p. 168; Browne, Archives of Maryland, Vol. XXIV, pp. 91-98, 265-273.

[60] St. George L. Sioussat, English Statutes in Maryland, Johns Hopkins University Studies, Vol. XXI (1903), pp. 515-520.

[61] He recited Mr. Creswell's speech in the House of Commons, March, 1627, to show that English law applied to all English subjects. But in any case, he contended, many English statutes extend to the colonies by implication. Among these are the Habeas Corpus Act, the Petition of Right and Magna Carta. "Magna Charta was made, which as all eminent Lawyers agree, is, and indeed by the words of it, appears to be a Declaration of the Common-Law—1 Inst. 81—The 29th (39) Chapter is not long, and ought to be read by every Body, and (in my humble opinion) taught to Children with their first Rudiments." (quotes it). Page 14. He also cited the due process phrase in the statute of 28 Edward III, ch. 3. "This statute, directs no new Process of Law: and enacts over again, what seems to have been provided for, by Magna Charta, which was in full Force, when this Statute was made." Page 15. He indicated that this protection has

§ 38. The legislature of South Carolina was not quite so presumptious and was content with a re-enactment *verbatim* from Keble's Statutes at Large of certain portions of the English statute law which suited them, although in each case it seems that not only were the significant portions of Magna Carta, especially the thirty-ninth chapter, re-enacted but the Petition of Right and the Habeas Corpus Act as well.[62] North Carolina followed the example of her southern sister in 1749 and included in the list of statutes re-enacted that of Edward III, providing for "due course of law."[63] The axe of disallowance probably failed to fall on these laws of the Carolinas because they were specific re-enactments of definite provisions of the English statutes. English lawyers at least thought they knew just what these provisions meant, but not so with such a wide provision as "Rights and privileges of Englishmen" which might be interpreted to mean anything in the local colonial courts. For such a sweeping provision there was no technical legal meaning such as due process of law was

been confirmed many times but declared that "To recite but a very small part, of all the Statutes, that have been made to confirm, and establish the Subject's Rights, and Liberties that were his by the Common Law, would be too tedious." Page 15. Indeed, he argued, had the colonists no charters at all they would be protected by these statutes for they are Englishmen and as such are entitled to that protecion. Page 28. Daniel Dulany, "The Right of the Inhabitants of Maryland to the Benefits of the English Laws" (reprinted as Appen. II to Sioussat's English Statutes in Maryland, Johns Hopkins University Studies, Vol. XXI, pp. 543-568). In citing the pages in this pamphlet I have used the paging of the original.

[62] The first of these Acts was that of June 20, 1694, entitled "An Act to put in force the several Acts of the Kingdom of England therein particularly mentioned." The original act has been lost and it was repealed by the subsequent Act of December 12, 1712, entitled "An Act to put in force in this Province the several Statutes of the Kingdom of England or South Britain, therein particularly mentioned." It reenacted certain portions of Joseph Keble's Statutes at Large in paragraphs and sections or numbers from Magna Charta until this time (London, 1684), among which was the due process provision from Magna Carta. There was also a provision enacting the common law for the colony as well as another that "all such statutes in the kingdom of England as declare the rights and liberties of the subjects and enact the better securing the same" should be enforced in South Carolina. Thomas Cooper, Statutes at Large of S. Carolina (Columbia, 1837), Vol. II, pp. 81, 402 ff; J. F. Grimke, Public Laws of the State of S. Carolina (Phila., 1790), pp. 25-100.

[63] Saunders and Clarke, Records of North Carolina, Vol. XXIII, pp. 317-324.

supposed to have. The crown seems not to have realized that the very acts which seem to be such drastic limitations upon executive authority might be construed as a restriction upon legislative power as well.

On the colonial side, the significance of these efforts is tremendous. Some, e. g., William Penn, may have supported the demand for a statement of popular rights for sentimental reasons or because the sonorous words of the Great Charter would lend dignity to the statute book. For the most part, however, the motives of the colonists seem to have been deeper. The persistence with which they demanded such statements in the statutes is not without significance. In Maryland they seem to have enacted them for one year's time to circumvent the danger of royal disallowance.[64]

It is more probable that arbitrary procedure on the part of officers not chosen by the colonists formed the root of their demands. They hoped these articles might become a valuable check upon the oppressive administration of the law, particularly in levying taxes and enforcing the criminal code. For the most part the colonists had little cause to fear the colonial legislatures, but it is noteworthy they were taking no chances in the matter. Who could tell when a clever governor might be able to dominate the popular body to the great detriment of the people? To prevent such a contingency there was a very real demand that the protection be as general in form as possible. For that very purpose probably nothing was more satisfactory than the very words of the famous thirty-ninth article itself.

[64] Hazeltine, Influence of Magna Carta (Malden, Essays), pp. 196-198.

CHAPTER VII.

COLONIAL MEANING OF DUE PROCESS.

§ 39. There can be no question that the procedural elements of due process were uppermost in the minds of the colonists before the period of the Revolution. The wording of the colonial attempts to write this protection into the local statutes as well as the circumstances which evoked a demand for their restatement prove this if proof is needed. Many of the colonial governors were notoriously arbitrary and the administration of the penal laws of the colonies caused many difficulties, some of which centered around this protection. One of the first of these grew out of the difficulty of administering the law in Maryland where the large Quaker element refused to take the regular oath required by the courts of law. An appeal was made to the assembly to pass an act permitting affirmations but the proposal was unanimously rejected. An official presentation was drawn up to explain the defeat of the law and one of the five objections to it was that a mere affirmation would not give the regular form of judicial procedure demanded by the Great Charter.[1]

The cleverness of those who drafted this explanation is only understood when we remember the enthusiasm the Quakers were known to have had for individual rights and particularly for Magna Carta. William Penn may be

[1] The bill was entitled "An Act for Prescribing how to give Evidence to those of tender Conscience." Among the reasons advanced for defeating it was the following: "The Assembly hath admitted and obliged the judges to proceed according to the Lawe of England and in that Lawe wee can take noe mans life nor dispose of any mans Estate but by the oathe of lawfull witnesses." Proceedings and Acts of the General Assembly of Maryland (Jan., 1637-8-Sept., 1664): W. H. Browne, Archives of Maryland (Baltimore, 1883), Vol. I, pp. 436-437.

said to have been the father of the idea of due process of law in the Dutch and Quaker colonies. He became interested in this protection in a very practical way in 1670 when he was hailed before a London magistrate on the charge of disturbing the peace. His demand for a trial by an impartial jury and his resistance to the efforts of the judge to coerce his peers into finding him guilty were based almost entirely upon the Great Charter as interpreted by Coke.[2] But the remedy for legislative violations of due process of law was to be found largely in an enlightened public opinion, according to Penn. Conse-

[2] He was indicted, together with William Mead, for having addressed a crowd in a London street which, it was said, resulted in a public disturbance of the peace. The jury refused to bring in a verdict convicting him, whereupon the judge fined both prisoners and the jury for contempt of court; the former because they had not removed their hats in the court room and the latter because they had not convicted Penn and Mead. Penn contended that he was not allowed a fair trial in that he was given no copy of the indictment before being required to enter his plea, that he was threatened with contempt of court if he spoke in his own defense, that the jury was threatened with imprisonment if they acquitted him, and that he was not allowed a jury trial on the question of contempt of court. He objected asking "If it be according to the Fundamental Laws of England, that any Englishman should be fined or amerced but by the judgment of his Peers or Jury; since it expressly contradicts the fourteenth and twenty-ninth [thirty-ninth] chap. of the Great Charter of England." Page 23. He recited the law of the land provision and explained its meaning to be "So that the judgment of any fact or person, is by this Fundamental Law referred to the Brests and Consciences of the Jury. . . . It is a Synonimous Expression importing no more than by a Tryal of Peers, or a Jury; for it is sometimes rendered not (or) disjunctively, but (and) which is connectively; however, it can never signify anything contrary to the old way of trying by Peers, for then it would be connected to a contradiction.

"Besides, Cook well observes, that in the 4th chapter of the 25th Edw. 3. *Per Legem Terrae,* imports no more than a Tryal by due process, and writ original at Common Law, which can not be without a Jury." Pages 44, 45 (William Penn) The Peoples Ancient & Just Liberties Asserted in the Tryal of William Penn and William Mead (n. p. 1670).

He left no doubt that Magna Carta is a part of the fundamental law of England. "So heinous a thing was it esteemed of old, to endeavour an enervation, or subversion of these antient rights and privileges that acts of parliaments themselves (otherwise the most sacred with the people), have not been of force enough to secure or defend such persons from condign punishment who in pursuance of them have acted inconsistent with our Great Charter. . . . Parliaments are said to err when they cross it; the obeyers of their acts punished as time-serving transgressors, and that kings themselves . . . have with great compunction and repentance, left among their dying words their recantations." William Penn's Case, 6 Howell State Trials (1670), 951 at 990.

quently he undertook the task of educating not only the people of England,[3] but those in America regarding their privileges in this respect.[4] So successful was he that henceforth the right of trial by jury seems not to have been questioned.[5]

§ 40. Another element which the colonists generally considered as essential to criminal proceedings according to due process of law was a regular indictment. The damage which might be done to innocent parties by forcing them to stand trial before being regularly indicted was well understood. Unless the indictments were made according to the recognized rules of the common law they would be of little value as a protection.[6] In Virginia a

[3] William Penn, England's Great Interest in the Choice of this New Parliament (n. p. 1679). Also found in A Collection of the Works of William Penn (pub. by J. Sowle, London, 1726), Vol. II, p. 679. In describing this protection he declared that "Inasmuch as No Man, according to the Ancient Laws of this Realm, can be adjudg'd in Matter of life, liberty, or Estate, but it must be by the Judgment of his Peers, that is, Twelve Men of the Neighborhood, commonly called a Jury; though this hath been infringed by Two Acts, made in the late Long Parliament, one against the Quakers in Particular, and the Other against Dissenters in General, called An Act against Seditious Conventicles. . . ."

[4] In 1687 he published at Philadelphia an edition of Magna Carta which contained not only that document but also the "Confirmation of the Charters," the *"Statute de Tallagio non Concedenda,"* the "Charter of the Forest," the "Sentence of the Clergy against Breakers of these Articles, and against breakers of the Charter," an abstract of Penn's Patent and a copy of the "Frame of Government." Warren, History of the American Bar, p. 103; Isaac Sharpless, History of Quaker Government in Pennsylvania (Phila., 1898), Vol. I, pp. 52, 53.

His purpose in publishing this work was to inform the people regarding their rights because they had no time to read large law books and these were very scarce in the colonies. By informing them he hoped to prevent encroachments upon these privileges or giving them away. He declared these documents to be "Fundamental Laws of England, bedecked with many precious Privileges of Liberty and Property" and evidently considered the most important of these the thirty-ninth chapter of Magna Carta. Sharpless, History of Quaker Government, Vol. I, pp. 52-54.

[5] In Maryland attorneys on both sides admitted that the Great Charter required a regular administration of justice by one's peers. Miller v. Lord Proprietary, 1 H. & McH. (Md., 1774) 543.

[6] The American Weekly Mercury of Feb. 26, 1722, 1723, declared that the bill of indictment which had been summarily brought against Franklin for publishing the Courant was contrary to Coke's observation that the law must try before punishing. Isaiah Thomas, History of Printing in America (transactions of the American Antiquarian Soc., Vols. V, VI, Albany, N. Y., 1874), Vol. II, p. 36.

regular indictment was considered by some of the legal profession at least, a necessary part of due process of law, and the lack of such procedure was declared to be good ground for freeing the prisoner.[7] In North Carolina the assembly complained that there had been arbitrary commitments to prison contrary to the Great Charter.[8]

The people of North Carolina seemed democratically inclined for they demanded that even the executive be elected by them.[9] This may have been due to the fact that it was dangerous to criticise the governor when he was appointed by the crown. Edmond Porter was indicted for treason on the ground that he had asserted that his excellency had violated Magna Carta.[10] There was probably some foundation for his complaints, for even the British government heard of the situation in North Carolina and

[7] In 1682 Robert Beverley was arrested for complicity in plant cutting. His lawyer, William Fitzhugh, declared that Magna Carta, the Petition of Right and Habeas Corpus were fully recognized in Virginia and were sufficient to secure to his client a regular judicial procedure according to established usage. "Writ of Habeas Corpus," William and Mary College Quarterly, Vol. III (Jan., 1895), p. 149.

[8] "Moreover several worthy Persons, Some of which Members of the House have been most illegally in an Arbitrary manner, without cause comitted to Prison & there Detained, & tho' they have demanded Copys of their comitment, yett they have been refused them. This we take to be a great Infringement of our Libertys as we are Freemen Brittains, to be Contrary to the Great Charter & to that Invaluable Act of Parliament comonly called the Habeas Corpus Act." Address of Lower House answer to the governor's speech. Apr. 11, 1726. W. L. Saunders and Walter Clark, Colonial State Records of N. Car. (Raleigh, 1886-1914), Vol. II, p. 614.

[9] "The fundamental constitutions were intended to be unalterable, but now as little regarded as Magna Charta in England, this Lawless people will allow of no power or authority in either church or state save what is derived from them." Letter from Mr. Urmstone (colonial missionary) to the Secretary of the Society for the Propagation of the Gospel, N. Car., Jan. 29, 1716, 1717. Saunders and Clark, Colonial and State Records of N. Car., Vol. II, p. 271.

[10] The indictment of Edmond Porter, March 28, 1727, alleged that he had declared: "'If by being Governor he thinks himself invested with an absolute power of Acting as he thinks fitt it will be convenient in due time to convince him the contrary and make him sensible that English born subjects will never tamely give up their undoubted right while so inestimable a Book as Magna Charta is' thereby insinuating & suggesting that the sayd Sir Richard Governor thought himself invested with an absolute power & acted in an arbitrary manner against Magna Charta and invading the rights and libertys of the subjects." Saunders and Clark, Records of North Carolina, Vol. II, p. 689.

warned the governor to be more careful in his judicial administration.[11] On the other hand, the disorderly character of much of the population undoubtedly made stern measures a necessity, and it is not surprising that the Supreme Court of the colony should have refused to listen to a plea that it was contrary to due process to require an exorbitant bail.[12] It is significant, however, that even though it was quite generally recognized that stern measures were necessary many of the colonists considered that these measures need not be arbitrary.

This appears nowhere more clearly than in Massachusetts in the trial of John Checkley in 1724 on the charge of libel against the government. The trial court refused to give him a hearing but the appellate court recognized the validity of his claim that due process of law accorded him the privilege to personally defend himself and grudgingly told him to proceed. He might as well have saved his words for the judges had already made up their minds that he was guilty and as soon as he finished his defense he was sentenced.[13] Even the stern puritan judges, however, recognized the necessity of preserving the form of com-

[11] Royal instructions to George Burrington, Governor of North Carolina, Dec. 14, 1730. "62 You are to take care that no Man's Life, Member, Freehold or Goods be taken away or harmed in our said Province otherwise than by established and known laws not repugnant to but as near as may be agreeable to the laws of this Kingdom And that no persons be sent prisoners to this Kingdom from our said Province without sufficient proof of their crimes and that proof transmitted along with the said prisoners." Saunders and Clark, Records of North Carolina, Vol. III, p. 231.

[12] The Supreme Court consisted of the governor and council. In this case (May 13, 1731) they concluded that if the man were innocent he could get the bail back and if he were guilty there was no bail too heavy. Saunders and Clark, Records of N. Car., Vol. III, p. 231.

[13] Checkley's argument before the appellate court is very interesting. "By the statutes of Magna Carta, chap. 29, 5 Edw. III. chap. 9 and 23 Edw. III. chap 5. No man ought to be condemned without answer. Coke's 4 Instit 38. And my Lord Coke says in the same place, that the more high and absolute the jurisdiction of the court is, the more just and honorable it ought to be in the Proceeding, and to give Example of Justice to inferior Courts.

"I was not suffered to defend myself in the Inferiour Court; I beseech your Honours to let me make my Defence."

The Chief Justice said, "Well, go on." Page 21.

In the course of his defense he contended that "the Common Law, and especially Magna Charta is allowed to be the Law of the Plantations, and

mon-law procedure particularly when they found that the prisoner was familiar with the writings of Sir Edward Coke.

§ 41. Because of the close correlation between the protection of public rights and that of private rights, one is not surprised to find that the colonists insisted upon due process of law in private civil suits as well as in the administration of the penal code. Some of the most bitterly fought cases before the colonial courts involved the ownership of land. This was particularly true in the southern colonies where a group of circumstances conspired to make the titles unusually obscure. In the case of Digges's Lessee v. Beale (Maryland, 1726), Daniel Dulany, Sr., perhaps the ablest of the colonial lawyers, successfully urged that due process of law required a notice and hearing before land claims could be settled. Therefore, even though the settlement of the claim had been made by the courts and the wronged party was not barred from bringing a subsequent suit to recover title, the original settlement was entirely void because the proceeding violated Magna Carta. A claimant to a piece of land could not be put to the additional expense of bringing another suit except by due process of law.[14] A similar claim was upheld in North Carolina in connection with the quit-rent law (1738). This act provided that if crown patents to

every Englishman's Birth-right." Page 34. E. F. Slafter, "John Checkley" (Prince Society Publications), Vol. 23 (Boston, 1897), Vol. II, pp. 1-50.

[14] The father of the defendant had held a patent to land from Lord Baltimore but upon the former's death the court granted a *scire facias* and deprived his widow of the land without notice or hearing. The widow was an infant at the time. In a suit to recover title to the land Daniel Dulany, one of the most eminent of colonial jurists, declared that because Mrs. Beale had received no hearing the writ was void for she was entitled to a hearing under the common law and especially under the thirty-ninth chapter of Magna Charta. "It is a fundamental and immutable principle of Magna Charta that justice must not be sold. So it is, that no man ought to be condemned unheard. . . . By the very right of nature, every man living who is neither an idiot or lunatic, cannot but know that every person has a right to be heard in defence of his life, his liberty, or his property. And to put a man to the expense and fatigue of a formal proceeding to reverse such a judgment, is surely selling him justice, or which is the same thing, putting him under the necessity of buying it." The judgment was given for Mrs. Beale and this was affirmed in 1728 by the court of appeals. 1 H. & McH. (Md., 1726) 67.

land were not registered within eight months they would be void unless validated by the governor and council. It was urged that it would deprive many of their land to require them to register their patent in such a short time and therefore the law was contrary to the Great Charter. Because of the unusual method of procedure involved, and because the act would expose many innocent people to the arbitrary whim of the governor and council, it was disallowed by the Board of Trade in England.[15]

That many were already seeing the close relation between due process of law and vested rights is most clearly seen in two cases arising out of the colonial paper-money acts. Many of the colonies, in order to make cheap money plentiful, had made very frequent use of the printing press regardless of the specie held to protect the bills issued. When Massachusetts undertook to retire some of its issues, complaint was heard on all sides. Perhaps the most curious of all the arguments was that since the legislature had undertaken to provide the people with paper money to retire it would be a breach of their agreement with the people and contrary to the Great Charter.[16] With the

[15] The act provided that unless the crown patents to land were registered within eight months they would not be valid unless it could be shown to the satisfaction of the governor and council that they were *bona fide* grants. Among the objections urged by Mr. McCulloh, the agent for North Carolina, before the Board of Trade was that it violated the constitution of the colony in that it enabled the governor and council to settle matters of land title. "The Grants of the Crown are of the most sacred nature, and ought not nay by law, cannot be rescinded & sett aside, but by due course of law, in the fair comon ordinary method of Tryal by a Jury." Therefore he argued that to give the governor and council power to dispose of the matter to their own satisfaction "is against the first principles of Law, Destructive of ye undoubted Rights & Libertys of the subject, breaks in on Magna Charta & all the Laws of Great Britain . . ." June 4, 1740. Saunders and Clark, Records of North Carolina, Vol. IV, p. 429. This act was disallowed by the Lords of Trade, July 21, 1740. *Ibid.*, Vol. IV, pp. 434, 435.

[16] It was contended that the cancellation of the public bills of credit was a public fraud. "It is establishing of Iniquity by a Law." In answering an anonymous pamphlet called "An Enquiry, etc.," it was declared that the writer of that pamphlet "hints at what he imagines a Sort of Magna Charta, granted A. 1712 by our Assembly to the People, whereby they virtually took upon themselves, to supply the Province with Bills to serve as money, therefore if we do not postpone these Bills, the Legislature are guilty of a breach of Magna Charta. Was there ever a heresy from any

difficulties which other colonies had experienced in the inflation of their currency to guide him, there is little wonder that the Attorney General of the Barbadoes raised strenuous objection to the paper-money act in that colony. He pointed out that inflation really wipes out debts and so practically amounts to a summary execution of bonds and mortgages in favor of the debtor. This he contended could not be done without violating due process of law.[17] That the colonists were very jealous of their property rights was but natural, and with their background of the English common law, it is not surprising that they should

Scriptural System, so enthusiastically imagined, and so ill founded." Page 53. "Postscript, to a Discourse concerning the Currencies of the British Plantations in America." Published in Boston about 1744. Reprinted in "Colonial Currency Reprints." (Publications of the Prince Society, Vol. 35, Boston, 1911), Vol. IV, pp. 53-65.

[17] William Rawlin, Attorney General of the Barbadoes, in an opinion to the governor declared that the act of the assembly creating paper money and forcing its acceptance was void. "For that the great statute of Magna Charta, which is so dear to all English subjects, and hath been two and thirty times confirmed, positively declared, that no man shall be disseized of his freehold, but by due process of law.

"And how this act, contrary to this, and many other statutes of the kingdom of England, can enable the disseizing any person of his freehold, by a bare warrant, without trial, whether the debt is due or whether, if due, it is satisfied or not, seems very strange, and contrary to common right and reason, as well as law; further, I take it, that the then governor's commission could not empower the passing any such act, for that the words of the said commission are, that no laws shall be passed, that are repugnant to the laws of England, but all such laws, as shall be passed here, shall be, as near as may be, agreeable to them, and this act, being almost, in every branch repugnant, nay, and further to take away all the power and force of Magna Charta, is contrary to the said commission, as well as law, and therefore void, for it is a maxim, that an act of Parliament, that is against common right, or reason, or is repugnant, or impossible, in itself, is void." Pages 29, 30.

He had obvious reference to the English cases when he declared that the legislature could not grant a commission "to do anything against the law of God, or the nation, as to take, or imprison men's bodies, enter upon their lands, or take their goods, without due order of law, and if any such be granted, the law declares such commission void." Page 30. But he carried it somewhat further by saying that the Legislature "cannot, by a law, alter the common law of England, and the settled course of proceedings thereon, they cannot change the common securities of the kingdom." Page 31. These securities he found in the Great Charter. "The statute of Magna Charta is express, that no person shall be restrained of his liberty, or disseized of his lands, or tenements, but by due trial, according to the law of the land, the benefit of which is wholly taken away by this act, and the subject debarred of his liberty, without trial, or any other due course of law." Pages 32, 33. Chalmers, Colonial Opinions, Vol. II, pp. 27-38.

have appealed frequently to it when those rights were in danger of infringement.

§ 42. Closely connected with the right to hold property is the right to practice a profession. Professor Reinsch has noted the fact that there was opposition to lawyers through the colonies.[18] This opposition appears nowhere in more striking colors than in Virginia during the middle of the seventeenth century, where the legislature enacted a series of acts which ran the whole way from an incidental regulation to the absolute prohibition of the profession.[19] When the most drastic of these acts was sent to the governor and council for their approval they returned it with the answer that they would agree to it in as far as it was "agreeable to Magna Charta."[20] This seems

[18] Reinsch, English Common Law in the American Colonies, p. 43.

[19] O. P. Chitwood, Justice in Colonial Virginia (Johns Hopkins Univ. Studies, Baltimore, 1905, Vol. XXIII), pp. 514-516. The following acts of this character were passed during this period:

1642, 1643. Act LXI fixing fees for the services rendered by attorneys and requiring each attorney to be licensed by the court. No lawyer could refuse a case unless he was already employed on the other side. W. W. Hening, (Statutes at Large, Being a Collection of the Laws of Virginia from the first session of the Legislature in the Year 1619). (N. Y., 1823), Vol. I, pp. 275, 276.

1645, 1646. Act VII, expelling from office all mercenary attorneys, except those with suits pending. *Ibid.*, Vol. I, p. 302.

1646, 1647. Act VIII, repealing the Act of 1642, 1643, and continuing the Act of 1645, 1646 in full force. *Ibid.*, Vol. I, p. 313.

1647, 1648. Act XVI, enabling the court to appoint attorneys in certain cases. The attorneys might receive pay. *Ibid.*, Vol. I, p. 349.

1656, 1657. Act VI, repealing all acts regarding mercenary attorneys and giving the governor and council power to license them. *Ibid,* Vol. I, p. 419.

1658, 1659. Act CXII, prohibiting pleading for a fee under penalty of a fine of 5000 pounds of tobacco for each breach. No one could plead unless he took an oath that he was not pleading for a fee. *Ibid.*, Vol. I, pp. 482, 483.

1659, 1660. Act XVII, prohibiting sheriffs from pleading as attorneys under any circumstances and fixing a penalty of 1000 pounds of tobacco. *Ibid.*, Vol. I, p. 523.

1680. The Law of 1658 was repealed temporarily.

1718. The Act of 1680 was made permanent. Chitwood, Justice in Colonial Virginia, pp. 514-516.

[20] "The answer of the Governour and Council to the House's Message about the lawyers.

"The Governor and council will consent to this proposition so farr as it shall be agreeable to Magna Charta. 23 Martii, 1657.

WM. CLAIBORNE."

to be the first instance on record in which an exercise of the police power was questioned, as being opposed to the "law of the land."

§ 43. The history of the colonial constitutional crises begins and ends with controversies over the taxing power. The colonists seemed to reflect the general tendency of Anglo-Saxon constitutional history in this respect. The rise of Parliament, the fall of the early Stuarts, the American Revolution, and the reform of the House of Lords arose out of fiscal difficulties of one sort or another. But long before the Revolution the colonists had experienced difficulty with their taxing machinery. Within fifteen years of the time when Winthrop was attempting to prove that the Body of Liberties contained the essential provisions of Magna Carta, a case arose in which it was contended that the fundamental law prohibited any tax which was not for a public purpose. The trial judge agreed with this contention on the ground that the law of the land was a basic law which was superior to acts of the town government, or even to those of Parliament itself.[21] Inasmuch as

The Assembly resolved to draw up an answer to this message and appointed a committee to draft one. This committee reported the following answer which was adopted:

"The humble reply of the Burgesses to the Governour and Councill 1. Concerning Lawyers. 2. Concerning the manner of proceedings in Law.

"To the first wee have considered Magna Charta and wee cannot discerne any prohibition conteined therein but that these propositions may pass into lawes.

"It was resolved in two former Assemblyes that it was not onely necessary but that they had power to make lawes for that purpose, as appears by two acts of Assembly now upon record.

"The first whereof stood in force above ten yeares and the later addition was added in 1647, which acts stood in force until the last assembly, and soe we humbly conceive that wee have no less power nor cause to make the like lawes." March 25, 1658. Hening, Statutes at Large, Vol. I, pp. 495, 496 n. See also E. D. Neill, Virginia Carolorum (Albany, N. Y., 1886), p. 264.

[21] The town of Ipswich had made a contract with Mr. Cobbet in which they agreed to give him eighty pounds sterling a year as maintenance if he would act as their minister. Subsequently they voted to raise one hundred pounds to buy him a house. The title to this house was to vest in him and his heirs in fee simple. Giddings objected to paying his proportion of this amount and the collector, Brown, distrained his goods contending that it was compulsory. Giddings then brought this action to recover the goods and damages. The case was tried June 22, 1657, before Judge Symonds

the proposed tax was for the purpose of presenting the minister with a parsonage as a gift, he contended, it was merely the confiscation of the property of one man for the benefit of another and consequently violated the law of nature and was *ipso facto* void.[22] While the decision of the trial court was reversed upon successive appeals to the general court of Salem and the general court at Boston,

who declared: "I understand this to be about a fundamentall law, and that a fundamentall law properly so called. It is such a law as that God and nature have given to a people. So that it is in the trust of their governors in highest place and others, to preserve, but not in their power to take away from them." This fundamental law included, he declared, the following rights: 1. That of election of Governors. 2. That of free enjoyment of property. 3. "That no custome or precedent ought to" contravene the first two of the ten commandments. He consequently gave judgment for the plaintiff and when the case was appealed to the Ipswich general court he wrote his reasons out in detail. "Hutchinson Papers" (Prince Society Publications), Vol. II, pp. 1-25.

[22] "It is against a fundamentall law in nature to be compelled to pay that which others doe give. For then no man hath any certaynty or right to what he hath, if it be in the power of others (by pretence of authority or without) to give it away . . . without his owne consent." Page 4. He recognized that this had been done in England as in the cases of knighthood money, ship-money, etc., but declared that these were illegal. "I dare say, if search be made into histories, lawyers bookes of reports, records, &c. it cannot be made to appeare that in the most exorbitant times any man hath had his estate taken from him as by the guift of others, under colour of lawe or countenance of authority. Noe, noe, lawyers would have blushed to have given such a construction of lawes; and suddenly their faces would have waxed pale." *Ibid.*, p. 4. "This I say further, and I doe argue it from the greater to the lesse. That if noe kinge or parliament can justly enact and cause that one mans estate, in whole or in part, may be taken from him and given to another without his owne consent, then surely the major part of a towne or other inferior powers cannot doe it." Page 5. He cited both Dalton and Finch to the effect that laws contrary to fundamental laws were void. Page 5. While it was true that Parliament had power to tax to pay for some service "for the immediate benefit of the whole," they cannot "take from Peter and give it to Paul." "In England, there is but one sort of men that might be deprived of their goods; which kinde are usually called slaves but there they are called villeynes to the lord of the manor." Page 6.

Furthermore he contended that it was evident that this tax was not for a public purpose because the property was given in fee simple to the minister. This alone made the tax void. Page 11. It was not his claim that the compulsory support of religion was not a public purpose but rather that this particular act was not necessary even for that support for it had been passed after the contract had been entered into with the minister. Consequently, he considered that this was merely a free gift to the minister and "soe leadeth more directly to tiranny as it seemeth" than did even the doctrines of the despised levellers. Page 16.

his argument in this respect was not met by either the attorneys opposing him, or by the appellate court itself.[23] The viewpoint was too novel to be understood by the conservative judges of the higher courts.

§ 44. The purpose for which public money might be spent seems not to have caused great difficulty in the colonies. By far the larger number of cases involving the Great Charter as a limitation on the taxing power center around the power to levy the taxes rather than the purpose for which the money might be spent. In their perennial struggle with the royal governors, the principal weapon of the colonial assemblies was the control of the purse strings. It was natural, therefore, that they should have been extremely jealous of this power and unremitting in their efforts to prevent the executive from finding other ways of financing the administration. In buttressing their claims to the sole right to levy all taxes, the assemblies appealed again and again to Magna Carta and the fundamental law there established.[24]

What was probably the first important constitutional struggle of this kind occurred in New York. When William Dyre attempted to collect customs in the port of New York which had not been regularly levied according to the customary procedure,[25] he was tried for treason, it being contended that to collect taxes which had not been regularly levied was contrary to the Great Charter.[26] The

[23] The case was finally disposed of with a decision for the defendant which established the legality of the levy for the parsonage, on Oct. 14, 1657, by the general court at Boston. "Hutchinson Papers" (Prince Society Publications), pp. 1-25.

[24] R. G. Thwaites, The Colonies (N. Y., 1897), p. 272.

[25] In 1674 the Duke of York promulgated the customs to be levied in the colony of New York. The term of his promulgation was for three years. In 1677 he renewed the tariff but in 1680 neither he nor the governor renewed them. The merchants refused to pay the taxes after 1680 and when Major William Dyre tried to collect them he was arrested and sent to England for trial. J. G. Leach, "Major William Dyre, of New York," American Historical Register, Vol. I (Sept., 1894), pp. 37-43.

[26] The charge against Dyre was "William Dyre standeth charged and accused by the name of Wm Dyre late of the Citty of New Yorke Gentl. for that hee the sd Wm Dyre severall times since the first of May anno 1680 att the citty aforesaid as a false traytour of our soveraigne Lord the

fantastic nature of the charge was recognized by the English authorities to whom he appealed, but in spite of his acquittal, the colonists had won an important moral victory. The necessity for popular consent to taxes was so forcibly brought to the attention of the colonial officials in London that when Governor Dongan was sent out he was instructed to call a representative body to establish the taxes on a permanent basis.[27] This body passed the famous "Charter of Liberties," which, while it never became law, showed clearly that the colonists based their claim to the power to tax themselves directly upon the "law of the land" provision in Magna Carta.[28]

A few years later a similar case arose in Massachusetts when the Reverend John Wise refused to pay the increased import duties which Governor Andros had arbitrarily levied without the consent of the legislature. Here again although the appeal of the Great Charter fell on deaf ears,[29] the tyrannical nature of the proceedings and the

King hath trayterously, maliciously and advisedly used and exercised Regall Power and Authority over the King's Subjects for the better support and upholding whereof hee the sd Wm Dyre hath traiterously, maliciously and advisedly plotted and contrived innovacions in Government and the subversion and change of the known Ancient and Fundamentall Lawes of the Realme of England, by virtue of which arbitrary and unlawfull power hee the said Wm Dyre (together with other some false Traytours unknowne) hath many times since the first of November last past Establisht and imposed unlawfull Customes and Imposicions on the goods and merchandize of his Majties Liege People tradeing in this Place, by force compelling them to pay the same and hath Imployed and made use of souldrs to maintaine and defend him in these his ujust and unlawfull practices contrary to the great charter of Libertyes, contrary to the Peticion of Right, and contrary to other statutes in these cases made and provided and contrary to the honour and peace of our most Soveraigne Lord the King that now is, his Crowne & Dignity. SAMUEL WINDER." Dated July 1, 1681. Brodhead, New York Colonial Documents, Vol. III, p. 289. Dyre had pled lack of jurisdiction in the colonial courts and hence was sent to England for trial. Leach, "Major William Dyre," American Historical Register, Vol. I, pp. 37-43.

[27] Royal Instructions to Governor Thomas Dongan of N. Y. Broadhead, New York Colonial Documents, Vol. III, pp. 369-375.

[28] Governor Dongan opposed this measure and although James II signed it as Duke of York in Oct., 1684, upon ascending the throne it was disallowed. Osgood, American Colonies, pp. 163-168. See also secs. 5, 35.

[29] Imprisonment of Reverend John Wise, et al. In this case Sir Edmund Andros as governor of Massachusetts Bay promulgated an act Feb. 15, 1687, which levied certain additional duties on imports. Wise claimed

importance of the issue involved, so aroused public opinion that the moral victory was with the colonists. This became more and more evident under the new charter issued by William and Mary five years later.[30]

§ 45. The victory of the colonists in New Jersey was even more clear cut. Before 1702 the colony had been divided into East New Jersey and West New Jersey. When the colony was united, the question arose if the protections against arbitrary taxation, which had been incorporated in the fundamental laws of the colonies before the Union,[31] were still in force. The new governor, Viscount Cornbury, whose administration has become a byword for corruption and arbitrariness, insisted upon levying fees without the aid of the lower house of the legislature. The Assembly protested that such a procedure was a direct violation of the due process provision in his instructions, as well as of Magna Carta.[32] The governor

that he was unable to pay these duties and urged nonpayment at a town meeting. He was arrested, denied a writ of habeas corpus and sent from Ipswich to Boston for trial. He claimed that both Magna Carta and the statute laws of England "secured the subjects, properties and estates, etc." "To which was replied by one of the judges, the rest by silence assenting, that we must not think the laws of England follow us to the ends of the earth, or whither we went. And the same person declared in open council upon examination of said Wise; 'Mr Wise, you have no more privileges left you, than not to be sold as slaves,' and no man in Council contradicted." He was found guilty of counseling not to pay the tax and was fined fifty pounds sterling. The court was composed of Joseph Dudley, Stoughton, John Usher, and Edmund Randolph. From a sworn affidavit of Wise, et al., sent to London at the request of the successor of Andros as a part of the evidence against the former governor. J. B. Felt, History of Ipswich, Essex & Hamilton (Cambridge, 1834), pp. 123-127; (Edward Rawson) "The Revolution in New England justified" (Boston, 1691), pp. 13-17, reprinted in Peter Force, Tracts and other papers relating principally to the Origin, Settlement, and Progress of the Colonies (Wash., 1846), Vol. IV, No. 9.

30 W. MacDonald, Select Charters, No. 42.

31 Both parts of the colony had incorporated a due process provision in their fundamental laws. See sec. 5.

32 "6thly. Establishing Fees by any Other Power or Authority then by the Governour, Councill, and Representatives met in General Assembly, we take it to be a great grievance, directly repugnant to Magna Charta, and contrary to the Queens express directions in the Governours Instructions which says, You are to take care, that no man's Life, Member, Free-hold or Goods, be taken away or harmed in our Province under your Government, otherwise then by established and known Laws, not repugnant to but as

claimed that the queen's instructions specifically gave him power to levy fees without the consent of the assembly if the council consented,[33] and his argument was legally probably the better of the two;[34] but the assembly insisted that such a financial measure was a law and as such could be enacted only with the consent of both houses of the legislature.[35] The governor's tactless answer to their protest, and his absolute refusal to consider their reply to his answer,[36] together with the notorious inefficiency of his

much as may be agreeable to the Laws of England. We therefore pray that the Governour will assent to an Act to be passed to settle Fees, without which we think no more can be legally demanded, than the Persons concerned by agreement oblige themselves to pay." Protest of the Assembly, May 8, 1707, "against certain evils, to which the Province was subjected." Samuel Smith, History of the Colony of Nova Caesaria, or New Jersey (Burlington, N. J., 1765), p. 291; W. A. Whitehead, Documents relating to the Colonial History of the State of New Jersey (Newark, N. J., 1881), Series I, Vol. III, p. 173.

[33] "That Clause of my Instructions which you recite in this Article, has no manner of relation to Fees. Indeed, there is another Clause in my Instructions, which directs how, and by whom all Fees shall be settled, and the Queens Commands have been observed." Then he recited the forty-seventh section of his Instructions which provided that fees were to be levied with the consent of the council, and added somewhat caustically, "And I challenge every one of you and all Mankind, to shew how, where and when, any Mans Life, Member, Free-hold or Goods have been taken away or harmed in his Province since it came under her Majesties Government, otherwise than by established and known Laws, not repugnant to, but as much as may be, agreeable to the Laws of England." Whitehead, New Jersey Colonial Documents, Series I, Vol. III, pp. 188, 189. The Assembly had referred to the forty-ninth section of the same document. For Governor Cornbury's Instructions see: Smith, History of New Jersey, pp. 230-261; Whitehead, New Jersey Colonial Documents, Series I, Vol. II, pp. 506-536.

[34] Fees had been frequently settled by the governor and council in a number of the colonies. Greene, Provincial Governor, pp. 119, 120.

[35] "We cannot think the clause of your excellency's instructions, which we have recited, to be so foreign to the matter of fees, as your excellency says it is; for the enforcing the payment of fees, by any authority but that of the assembly's is taking away a man's goods otherwise than by established or known laws, except the act of a governor and council be a law, which we think is not, nor never intended by the queen it should." They contended that the section which he had relied upon (sec. 47) referred only to the power which he had to enforce fees which were already drawn up. Smith, History of New Jersey, p. 322; Whitehead, New Jersey Colonial Documents, Series I, Vol. III, p. 252.

[36] This was tendered to the governor on Oct. 29, 1707, and upon his refusal to receive it the Assembly ordered that it be recorded in the journal of the house. Smith, History of New Jersey, pp. 311-313; Whitehead, New Jersey Colonial Documents, Series I, Vol. III, p. 267.

administration, raised such a storm of protest that he was removed and Lord Lovelace was sent to replace him. Both of the sections in the instructions of Cornbury which had caused so much discussion were repeated in those of his successor,[37] but at the same time the Lords of Trade decided, on the basis of English precedents, that the argument of the assembly was the better one, and henceforth fees were to be laid only with their consent.[38] The colonists had won an important constitutional victory, but only with the aid of an inefficient colonial administration.

§ 46. Each colony had to fight out the question of the power to levy taxes for itself and the matter proved fully as troublesome in the other colonies as it had in New York or New Jersey. The cases usually arose when petty officers tried to collect fees which had not been authorized by formal act of the legislature. In several important cases the colonial assemblies protested that such exactions were illegal, but in none of these cases was the claim advanced that Magna Carta specifically prohibited them. Indeed, no less an enthusiast for the spirit and letter of the Great Charter than William Penn contended that there was nothing illegal in allowing the governor to settle the fees which should be levied.[39]

[37] These instructions are dated June 22, 1708. Whitehead, New Jersey Colonial Documents, Series I, Vol. III, p. 317. It is noteworthy also that the due process provision also appears in the Commission to Francis Bernard, as governor in 1758. Greene, Provincial Governor, Appen. A, Part IV, pp. 226-260.

[38] "We are also of Opinion that no fee is lawful unless it be Warranted by Prescription, or Erected by the Legislature, as was adjudged in Parliament in the 13th Henry 4th in the Case of the office then Erected for the Measurage of Cloths and Canvass. Vid. Cooke's 2: Inst: fol. 533, 534." Communication from the Lords of Trade to Lord Lovelace, Governor of New Jersey relative to the Remonstrance of 1707, June 28, 1708. Whitehead, New Jersey Colonial Documents, Series I, Vol. III, p. 327; Brodhead, New York Colonial Documents, Vol. V, p. 48.

[39] Penn declared that there was no oppression or extortion in allowing the governor to settle the fees. He further maintained that he was willing to allow the assembly the privilege of settling them as soon as they showed a disposition to "allow such fees as may reasonably encourage fit persons to undertake these offices." Letter from William Penn to the Assembly of Pennsylvania. London, Apr. 29, 1710. Robert Proud, History of Pennsylvania in North America (Phila., 1789), Vol. II, p. 51.

It seems probable, however, that the leaders in some of the colonial assemblies had Magna Carta in mind when they drew up their protests for the language which was used was sometimes strongly suggestive of it. The Maryland assembly in 1739 objected to the governor's attempt to levy fees because it would violate the "Liberties Franchises and Privileges of the Subjects of England."[40] In Virginia the revival of an absolute fee for the issuance of a patent upon crown lands caused a protest which was in part obviously copied from the thirty-ninth chapter of the Great Charter. It was only when the governor assured the assembly that the fee was only for patents issued in cases where the king had proprietary control that the matter was allowed to drop.[41] A similar protest was drawn up when the governor and council of North Carolina permitted the collectors of fees to discount the local paper money.[42]

[40] Protest of June 12, 1739, against the fees levied by the governor. This protest was based not only upon the "Liberties Franchises and Privileges of the Subjects of England," but also upon the Royal Charter although no section of the latter was specified. Proceedings and Acts of the Assembly, 1737-1740, Browne, Archives of Maryland, Vol. XL, pp. 420, 421.

[41] Governor Dinwiddie in 1753 revived the fee of one pistole (about $3.60) for signing each patent of land or for use of the seal in the Secretary's office where crown lands were concerned. On Nov. 17, 1753, the House of Burgesses asked by what authority such a fee had been levied and the governor replied that he had acted under his instructions with the advice of the council. The House then replied:

"The rights of the Subject are so secur'd by Law, that they cannot be deprived of the least Part of their Property, but by their own consent. Upon this Excellent Principle is our Constitut'n found'd, and ever since this Colony has had the Happiness of being under the imediate Protection of the Crown, the Royal Declarations have been 'that no Man's Life, Member, Freehold, or goods, be taken away or harm'd, but by established and known Laws.'" . . . But the charging of the fee was not by any known law and hence it was claimed to be an infringement of the people's rights. However, when the governor replied that the fee complained of was only charged in the disposal of the king's lands where the king had absolute control and was levied to relieve the quit rents the burgesses let the matter drop. R. A. Brock, Official Records of Robert Dinwiddie (Virginia Historical Society Collections, N. S. Vols. III, IV, 1883), Vol. I, pp. 44-47.

[42] Letter of Governor Dobbs to the Board of Trade, Aug. 3, 1760. Saunders and Clark, Records of North Carolina, Vol. VI, p. 288; Report of the Duke of Newcastle to the Secretary of State, July 2, 1731, *Ibid.*, Vol. III, p. 151.

§ 47. It is evident that the colonists looked upon due process of law as a guarantee which had a wide, varied, and indefinite content. At no time was there any serious attempt to define it, and it is noteworthy that they should seize upon these particular words under such diverse circumstances. It is not probable that any of the colonists realized how much was wrapped up in the thirty-ninth section of the Great Charter, but it is certain that many of them realized that it had a much wider import than merely guaranteeing proper procedure in criminal cases.

It was but natural that procedure should have been uppermost in the minds of the colonists in connection with due process of law. The words themselves imply a judgment by the regular process of common law. It seems certain that a notice and hearing, an indictment by grand jury, and a jury trial where one was appropriate was considered as the minimum of due process in criminal cases. It must not be supposed that the procedure in the colonies was as formal as that in the English courts; that was not to be expected. But they did feel that there were limits to which informality could go in both civil and criminal cases and these limits were reached the minute the proceedings acquired an arbitrary character.

But the colonists went farther. To some at least due process was a protection against arbitrary government in general. It is but a small step from the view that the procedure in a civil case must be according to the law, to the conception of the law of the land as a limitation upon the impairment of vested rights or the tyrannical exercise of the police power. In a few cases the colonial lawyers made this step, but the conditions of life were relatively simple and the cases involving such questions were consequently very few.

A still more striking application of due process of law came in connection with the taxing power. Arbitrary government can only perpetuate itself when it is buttressed with the power to raise funds for its support. The

colonists were determined to prevent this and bitterly contested every attempt of the executive to raise funds without the consent of the legislature. It was not infrequent, as in the case of New Jersey, that these contests centered around the interpretation of the law of the land provision in the colonial statutes or Magna Carta. Throughout this struggle the colonists were unconsciously building up the very line of argument which they were subsequently to hurl against the English government during the stormy preliminaries of the Revolution. In that period the interpretation of due process of law which had been but the vision of a few a short time before, was to become the common property of everyone and the way thus paved for its incorporation into the fundamental law of the new American nation.

CHAPTER VIII.

THE AMERICAN REVOLUTION.

§ 48. When the English officials in Boston decided to enforce the Navigation Acts by means of arbitrary general search warrants, the stage was set for the opening scene of the American Revolution.[1] Although these "writs of assistance" were probably legal, having been previously used both in the mother country and in the colonies, the merchants of Boston were in no humor to permit, without a legal battle, promiscuous invasion and search of their property.[2] Public interest has seldom been so aroused as it was in 1761, when Paxton, the collector of the port of Boston applied for writs to the Superior Court of Massachusetts. Under such circumstances the argument of James Otis, one of the ablest young attorneys in the colony, made a powerful popular impression.[3]

In his argument in this case Otis went to the very heart of the difficulties of parliamentary control over the colonies. Not only did he contend that without representation Parliament had no jurisdiction over America,[4] but he caught up the words of Lord Coke in Dr. Bonham's Case and insisted that regardless of the question of representation the power of Parliament was not unlimited.[5] He went even farther than his authority in this respect, for

[1] John Fiske, The American Revolution (Boston, 1891), Vol. I, p. 12.

[2] W. E. H. Lecky, The American Revolution (ed. by J. A. Woodburn, N. Y., 1913), pp. 47, 48. The former Chief Justice Sewall had expressed doubt if the writs were legal in Massachusetts. William Tudor, Life of James Otis of Massachusetts (Boston, 1823), p. 53. John Adams, Works (ed. by C. F. Adams, Boston, 1851), Vol. II, p. 124, n. 1.

[3] Letter from John Adams to H. Niles, Quincy, Massachusetts, Jan. 14, 1818. John Adams, Works, Vol. X, p. 275.

[4] Quincy (Mass.) 512-520.

[5] Tudor, Life of Otis, pp. 70, 71; Quincy (Mass.) 520-529.

he laid down in the clearest possible language the doctrine of judicial review, contending that when acts of Parliament were contrary to natural equity or the constitution of England "the Executive Courts must pass such Acts into disuse."[6] While he built his case largely upon the stream of *dicta* in the English decisions of Coke and his successors,[7] Otis coupled this line of reasoning with Magna Carta, citing the law of the land provision as a part of the fundamental law of the constitution which the courts must enforce.[8] In spite of his failure to convince the court,[9] the effect of his argument on the colonists was electrical. Otis at once jumped into tremendous popularity and a few months later was elected to the House of Representatives by an almost unanimous vote.[10] It may be somewhat of a hyperbole to declare, as John Adams did, that "Mr. Otis's oration against writs of assistance breathed into this nation the breath of life,"[11] but certain it is his arguments formed the basis of the conten-

[6] "As to Acts of Parliament, an Act against the Constitution is void: an Act against natural Equity is void: and if an Act of Parliament should be made in the very words of this Petition, it would be void. The Executive Courts must pass such Acts into disuse—8 Rep. 118, from Viner [Ab. Statute E. 6, pl. 15]—Reason of ye Com. Law to control an Act of Parliament." John Adams' notes on Otis' speech. Quincy (Mass.) p. 474; John Adams, Works, Vol. II, p. 522. See also G. R. Minot, Continuation of the History of the Province of Massachusetts Bay from the Year 1748-1765 (Boston, 1803), Vol. II, p. 98.

[7] He learned of these cases through the early seventeenth century abridgments and digests. "His main reliance was the well known statements of Lord Coke in Dr. Bonham's Case . . . Otis seems also to have had in mind the equally familiar *dictum* of Lord Hobart [Day v. Savage, 2 Hobart 87] . . . Lord Holt [12 Mod. 669 at 687] . . .

"The law was laid down in the same way, on the authority of the above cases, in Bacon's Abridgment, first published in 1735; in Viner's Abridgment, published 1741-51, from which Otis quoted it; and in Comyn's Digest, published 1762-67, but written more than twenty years before. And there are older authorities to the same effect." John Adams' notes on the argument of Otis. Quincy (Mass.) 520-529.

[8] Quincy (Mass.) 51.

[9] Minot, History of Massachusetts Bay, p. 99; Lecky, American Revolution, p. 48; Fiske, American Revolution, Vol. I, p. 13. Contrast the statement of John Adams, Works, Vol. X, p. 245.

[10] John Adams' letter to William Tudor, Quincy (Mass.), March 29, 1817. John Adams, Works, Vol. X, p. 245.

[11] John Adams' letter to H. Niles from Quincy (Mass.), Jan. 14, 1818. John Adams, Works, Vol. X, p. 276.

tion of some of the colonial pamphleteers who were to play such a large part in fanning into a flame the smoldering coals of revolution. This was especially true in the case of John Adams.[12]

§ 49. The occasion for the next protest which was to involve the question of due process of law was the levying of the stamp tax. This act, which was passed in February, 1765, was so unpopular that it was soon evident it was impossible to enforce it.[13] Resolutions, petitions, and memorials were passed by town meetings, colonial legislatures, and the Stamp Act Congress; pamphlets by the score presented the arguments of colonists and crown; and newspapers were filled with "letters" on the various points involved. It was in this protest literature that the arguments advanced by Otis bore the greatest fruit.

In the first place, the fundamental character of the constitution of the British Empire was quite generally recognized as being unalterable by simple parliamentary fiat.[14] This was the claim of Otis and Samuel Adams in their pamphlets and was based partly on the authority of

12 It is noteworthy that Adams looked upon this argument of Otis as being the natural consequence of the reasoning of Lord Bolingbroke (see ch. II, p. 61), John Adams, Works, Vol. II, p. 125. He took extensive notes and wrote up an elaborate brief of the argument of Otis. Quincy (Mass.), pp. 513-529. He added, "at the time of Otis' argument his position appeared to be supported by some of the highest authorities in the English Law.

"The same doctrine was repeatedly asserted by Otis, and was a favorite in the Colonies before the Revolution." *Ibid.*, pp. 526, 527. Corwin declares, however, that Otis abandoned this view shortly afterward and that it was chiefly through the influence of John Adams that it survived. Doctrine of Judicial Review and other Essays, p. 31.

13 Lecky, American Revolution, p. 81.

14 Otis claimed that "acts against the fundamental principles of the British constitution are void" as are also acts against natural equity, for "it is contrary to reason that the supreme power should have the right to alter the constitution." James Otis, The Rights of British Colonists Asserted and Proved (3d. Edition, Boston, 1776), p. 109, 110. (In J. Almon, Collection of the most Interesting Tracts Lately published in England and America on the Subjects of Taxing the American Colonies and Regulating their trade. (London, 1766), Vol. I, no. 2. For an excellent discussion of the colonial view of parliamentary limitations see R. G. Adams, Political Ideas of the American Revolution (Durham, N. Car., 1922), ch. VI.

Coke,[15] and Locke, and partly on the doctrine of rights reserved to the people.[16] It was urged in the formal protest of Otis and John Adams against the Stamp Act[17] and was recognized even by Governor Bernard in an effort to throw the responsibility for such an unpopular piece of legislation upon the courts.[18] Similar arguments were used in letters sent from Massachusetts House of Representatives to the English officials,[19] and in the Circular Letter sent to the other legislative bodies in the colonies.[20] Another argument declared that Magna Carta was the heart of the fundamental law and hence must be considered as unalterable because it summed up principles of the

[15] (Samuel Adams) A Letter to the Right Honorable, the Earl of Hillsborough on the Present situation of Affairs in America (Boston and London, 1769), pp. 37-39; Samuel Adams, The Rights of the Colonists (Boston, 1772), p. 506, reprinted in W. V. Wells Life and Public services of Samuel Adams (Boston, 1866), Vol. I, pp. 506, 507.

[16] "Clarendon," (John Adams), Boston Gazette, Jan. 27, 1766; John Adams, Works, Vol. III, p. 481.

[17] December 21, 1765. Adams argued: "The Stamp-Act, I take it is utterly void, and of no binding Force upon us, for it is against our Rights as men, and our Priviledges as Englishmen. An Act made in defiance of the first Principles of Justice; an Act which rips up the Foundation of the British Constitution, and makes void maxims of 1800 years standing." Page 200.

Otis emphatically said, "Lawyers know that there are limits, beyond which if Parliaments go, their acts bind not. 4 Inst. 122." Quincy (Mass.) 205.

[18] "The Arguments made use of, both by Mr. Adams and you [James Otis], would be very pertinent to induce the Judges of the Superior Court to think the Act of no Validity, and that therefore they should pay no Regard to it"; but he declined to interfere in judicial functions. Quincy (Mass.), 206. See also the letter from Hutchinson to Governor Pownall, March 8, 1766, 26 Mass. Archives, pp. 207-210, cited in Quincy (Mass.) 445.

[19] Letter from the House of Representatives of Massachusetts Bay to Right Honorable the Earl of Shelburne, Secretary of State, Jan. 14, 1768. Collection of Interesting, Authentic Papers relative to the dispute between Great Britain and America. (Published by J. Almon, London, 1777), p. 178; Letter to Right Honorable Henry Seymour Conway, Secretary of State, Feb. 13, 1768, *Ibid*, pp. 181, 182; Letter to Right Honorable Lord Camden, Lord High Chancellor, Jan. 29, 1768. *Ibid.*, p. 185; Letter to the Right Honorable Lords Commissioners of the Treasury, Feb. 17, 1768. *Ibid.*, p. 190.

[20] Circular letter to the Houses and Burgesses in America from the House of Representatives, Massachusetts Bay, Feb. 11, 1768. Collection of Interesting, Authentic Papers, etc., p. 191.

English constitution,[21] the rights of Englishmen,[22] and the inherent, natural rights of men.[23] It must not be supposed no one objected to this doctrine.[24] In fact, one of the best statements of the argument for a legislature of limited power was written in answer to a letter signed by "Chronus," who defended the omnipotence of Parliament, in the Boston Gazette. Samuel Adams, writing under the pseudonym "Candidus," clearly indicated the viewpoint of the radicals in advocating resistance to laws which were unconstitutional and cited for his authorities not only English writers but works on civil and natural laws as well.[25]

21 Letter by "A. B." to the Boston Centinel (*circa* 1765), The American Gazette (London, 1770), p. 48; Reply to the Massachusetts Circular Letter from Maryland, June 24, 1768, *Ibid.*, p. 25; Collection of Interesting, Authentic Papers, etc., p. 218. This was recognized as the prevailing argument in the colonies by Dr. Josiah Tucker, Letter from a Merchant in London, to his Nephew in America (1766), Reprinted in part as Appen. II to William Pulteney, Thoughts on the Present State of Affairs with America and the Means of Conciliation (London, 1778), pp. 88, 89.

22 James Otis, The Rights of British Colonies, p. 55; Jonathan Mayhew, The Snare broken, A Thanksgiving Discourse, Preached at the Desire of the West Church in Boston, N. E. Friday, May 23, 1766. (Occasioned by the Repeal of the Stamp-Act Boston, 1766), p. 4.

23 Samuel Adams, The Rights of the Colonists, in Wells, Life of Adams, Vol. I, p. 506; Argument of John Adams, Quincy (Mass.) 200-202. Governor Hutchinson summed up the opposition to the Stamp Act as follows: "The prevailing reason at this time is, that the Act of Parliament is against Magna Charta, and the natural Rights of Englishmen, and therefore, according to Lord Coke, null and void." Quincy (Mass.) 527 n. See also his letter to Jackson, the agent of Massachusetts in England. Quincy (Mass.) 441. John Adams declared that due process of law "if properly attended to might be sufficient even to make a Parliament tremble." Quincy (Mass.) 460. See also Adams, Political Ideas of the American Revolution, pp. 120, 121.

24 Article by "Pym," London Evening Post, Aug. 20, 1765, reprinted in John Adams, Works, Vol. III, p. 469.

25 "Chronus talks of Magna Carta as though it were of no greater consequence than an act of Parliament for the establishment of a corporation of button-makers. Whatever low ideas he may entertain of that Great Charter, and such ideas he must entertain of it to support the cause he hath espous'd, it is affirm'd by Lord Coke to be declaratory of the principal grounds of the fundamental laws and liberties of England. . . . But if it be declaratory of the principal grounds of the fundamental laws and liberties of England, it cannot be altered in any of its essential parts, without altering the constitution. Whatever Chronus may have adopted from Mr. Hume, Vatel tells us plainly and without hesitation, that 'the supreme legislative cannot change the constitution,' 'that their authority does not extend so far,' & 'that they ought to consider the fundamental laws as sacred, if the nation has not, in very express terms, given them power to

§ 50. In the early stages of the dispute the prevailing opinion seems to have been that if the colonists would but point out the discrepancy between the Stamp Act and Magna Carta, Parliament would speedily repeal it.[26] The colonists therefore undertook to show as specifically as possible just how the provisions of the Great Charter were broken by the objectionable statute. There were two chief objections to the stamp duties, and it was declared that Magna Carta was violated in both of these respects. In the first place, the colonies objected to paying taxes levied by a body which did not represent them. Simple assertion that taxation without representation violated the Great Charter was very common,[27] for nearly all those

change them.' And he gives a reason for it solid and weighty; for, says he, 'the constitution of the state ought to be fixed.' Mr. Hume, as quoted by Chronus, says, the only rule of government is the established practice of the age, upon maxims universally assented to. If then any deviation is made from the maxims upon which the established practice of the age is founded, it must be by universal assent. 'The fundamental laws,' says Vatel, 'are excepted from their [legislators] commission,' 'nothing leads us to think that the nation was willing to submit the constitution itself to their pleasure.' 'They derive their authority from the constitution, how then can they change it without destroying the foundation of their own authority?' If then according to Lord Coke, Magna Charta is declaratory of the principal grounds of the fundamental laws and liberties of the people, and Vatel is right in his opinion, that the supreme legislative cannot change the constitution, I think it follows, whether Lord Coke has expressly asserted it or not, that an act of parliament made against Magna Charta in violation of its essential parts, is void.—'By the fundamental laws of England says Vatel, the two houses of parliament in concert with the King, exercise the legislative power: but if the two houses should resolve to suppress themselves, and to invest the King with the full and absolute government, certainly the nation would not suffer it,' although it was done by a solemn act of a parliament. But such a doctrine is directly the reverse of that which Chronus holds; which amounts to this, that if the two houses should give up to the King, any, the most essential rights of the people declared in Magna Charta, the nation has not a power either *de jura* or *de facto* to prevent it. I may hereafter quote for his serious perusal the reasoning of the immortal Locke upon this important subject. . . ." Article signed "Candidus," Boston Gazette, Jan. 27, 1772. Samuel Adams, Writings (ed. by H. A. Cushing, N. Y., 1904), Vol. II, pp. 324-326.

[26] Samuel Adams' interpretation of the pronouncement of excommunication upon the breakers of the Great Charter in the reign of Henry III is interesting in this regard. Answer of the House of Representatives of Massachusetts to the Governor's Speech, Oct. 23, 1765. Samuel Adams, Writings, Vol. I, pp. 16, 17.

[27] As early as 1728, in the salary dispute between the assembly and the governor, the former had declared that it was "the undoubted right of all

engaged in the political debate wished to buttress their cause if possible, by reference to the venerable document.[28] Indeed one is almost convinced that many of the writers had never read the Charter which they praise so highly. No less a person than Franklin, when pressed in an examination for the specific words of the Charter of Pennsylvania which prohibited Parliament from taxing the colony, was unable to give them, but changed his argument to the more elastic and indefinite "rights of Englishmen, as declared by Magna Carta and the Petition of Right."[29] Some writers did go a little deeper and pointed out that it was contrary to the charter to take away a man's property without either his own or his representative's consent.[30]

Englishmen, by Magna Charta, to raise and dispose of money for the public service of their own free accord, without compulsion." R. G. Thwaites, The Colonies (N. Y., 1890), p. 272.

[28] Such seem to be the arguments of Thomas Cushing and Samuel Adams in a letter to "Rev. G. W." from Boston, Nov. 11, 1765. Samuel Adams, Writings, Vol. I, p. 30. See also the letter from James Otis, Thos. Cushing, Samuel Adams, Thomas Gray to Dennys de Bert from Boston, Dec. 20, 1765. *Ibid.*, pp. 65, 66; Edward Bancroft, Remarks on the Review of the Controversy between Great Britain and her colonies (London, 1769), p. 73; Jonathan Mayhew, The Snare Broken, p. 4; James Otis, Rights of British Colonists, p. 92.

[29] He further seems to have been uncertain as to the exact provisions of the Great Charter for he is unable to say if there is any distinction made in it between external and internal taxation. "The Examination of Doctor Benjamin Franklin Relative to the Repeal of the American Stamp Act, in MDCCLXVI." J. Almon, A Collection of the most Interesting Tracts lately published in England and America on the Subjects of Taxing the American colonies and Regulating their Trade (London, 1766), Vol. II, No. 3, pp. 45, 46; A Collection of Interesting, Authentic Papers, pp. 79, 80; A Collection of Scarce and Interesting Tracts (London, 1787), Vol. II, pp. 53, 54; Benjamin Franklin, Writings (ed. by A. H. Smyth, N. Y., 1906), Vol. IV, pp. 445, 446. It should be said, however, that Franklin makes very few references to Magna Carta in his writings.

[30] Samuel Adams, Rights of Colonists, reprinted in Wells, Life of Samuel Adams, Vol. I, p. 506; "T. Z." (Samuel Adams) in Boston Gazette, Jan. 9, 1769, reprinted in Samuel Adams, Writings, Vol. I, pp. 288, 289; Resolution of the Massachusetts House of Representatives, Oct. 29, 1765, Samuel Adams, Writings, Vol. I, p. 24; (William Knox), The Controversy Between Great Britain and Her Colonies Reviewed (Boston, 1769), p. 94; Revolutionary War Pamphlets, Vol. XVII, number 8. Perhaps the best statement of this was made by Daniel Dulany in Maryland. " 'The Common Law, the Great Charter, the Bill of Rights,' are so far from 'declaring with one Voice, that the Inhabitants of the Colonies shall be taxed by no other authority than that of the British Parliament,' that They prove the contrary; for the Principle of the common Law is, that no Part of their Property shall be drawn from British Subjects, without their Consent,

They may very well have had in mind the twelfth section of Magna Carta,[31] although that seems unlikely when we find but one specific reference to that section in this protest literature, while there are many indisputable citations of and quotations from the thirty-ninth section.[32] It is probable that the colonists had no particular section of the Great Charter in mind in making these references; but in so far as they did think of any particular chapters, it is reasonable to presume that one was the due process provision.

The colonists were not daunted by the difficulty of tying their principles of taxation to any particular section of Magna Carta. They argued that it was one of the fundamental principles of the English constitution that there should be no taxation without representation, and inasmuch as Magna Carta declared the Englishman's ancient birthright, taxation levied in any other manner would be contrary to the spirit of that great document, if not contrary to its wording. They stressed the fact that no new rights were declared in the Charter, but that it represented the spirit of freedom; and to that spirit they appealed.[33]

given by those whom They depute to represent Them; and this Principle is enforced by the Declaration of the Great Charter, and the Bill of Rights; neither the one nor the other, introducing any new privilege . . ." (Daniel Dulany) Considerations on the Propriety of Imposing Taxes in the British Colonies (London, 1766); (N. Y., 1765), in Revolutionary War Pamphlets, Vol. XVII, number 6, p. 42.

[31] "No scutage or aid shall be imposed in our kingdom except by the common council of our kingdom, except for the ransoming of our body, for the making of our oldest son a knight, and for once marrying our oldest daughter, and for these purposes it shall be only a reasonable aid; in the same way it shall be done concerning the aids of the city of London." Adams and Stephens, Select Documents of English Constitutional History (N. Y., 1901), p. 44.

[32] Alexander Hamilton, The Farmer Refuted (N. Y., 1775), in Works (ed. by John C. Hamilton, N. Y., 1850), Vol. II, p. 122, 123; also in Works (ed. by Henry Cabot Lodge, N. Y., 1903), Vol. II, pp. 172, 173; Hamilton in this instance cited the first two sections of the Rights and Privilege Act of New York, 1691, which corresponds to sections thirty-nine and twelve, respectively, in the Great Charter. It is noteworthy that he does not cite Magna Carta directly. See also Works (Hamilton edition), Vol. II, pp. 79, 80; (Lodge edition), Vol. I, pp. 112, 113.

[33] (Daniel Dulany), Considerations on the Propriety of Imposing Taxes in the British Colonies, p. 42; John Adams, Dissertation on the Canon and Feudal Law (1765) in Works, Vol. III, pp. 447-464; Alexander Hamilton,

The resolutions and letters sent out by the various legislatures show this point of view very clearly for there is a marked tendency to rely upon basic, immutable principles rather than on specific provisions of musty documents.[34] But whether it was the spirit of the document or its specific provisions that were invoked, it was none the less Magna Carta; and in vesting their claims on the great instrument, the colonists had in mind those protections of liberty and property from arbitrary action which are so essentially necessary to a free government.

§ 51. The second great objection which was raised to the Stamp Act was with regard to the method of collecting the tax. In order to facilitate its enforcement and prevent evasion, the act provided that offenders against it should be tried in the admiralty courts.[35] The colonists declared that "the primary, absolute, natural Rights of Englishmen as frequently declared in Acts of Parliament from Magna Charta to this Day, are Personal Security, Personal Liberty and Private Property,"[36] and whatever doubt they

The Farmer Refuted, Works (Hamilton edition), Vol. II, p. 48; (Lodge edition), Vol. I, p. 69. Hamilton writes: "It is the unalienable birth-right of every Englishman, who can be considered as a free agent, to participate in framing the laws which are to bind him, either as to his life or property. But, as many inconveniences would result from the exercise of this right in person, it is appointed by the constitution that he shall delegate it to another. Hence, he is to give his vote in the election of some person he chooses to confide in as his representative. This right no power on earth can divest him of. It was enjoyed by his ancestors time immemorial; recognized and established by Magna Carta; and is essential to the existence of the constitution. Abolish this privilege, and the House of Commons is annihilated."

[34] "It is a fixed and unalterable Principle in the Nature of Things, and a Part of the very Idea of Property, that whatever a man hath honestly acquired can not be taken from him without his consent; that this immutable Principle is ingrafted as a Fundamental into the English Constitution, and is declared by Magna Carta, and the Petition and Bill of Rights, and from thence every British Subject, the most distant, is justly entitled to all the Rights of Englishmen." Letter from the Maryland Assembly in reply to the Massachusetts Circular Letter, June 24, 1768. American Gazette, p. 25; Collection of Interesting, Authentic papers, p. 218. See also the Resolutions of the Lower House of Maryland, Sept. 28, 1765, Collection of Interesting, Authentic papers, p. 23; Representation of the General Assembly of the colony of New York to the House of Commons, Dec. 31, 1768.

[35] Lecky, American Revolution, p. 73.

[36] Letter to Dennys de Bert from Otis, Thomas Cushing, Samuel Adams, and Thomas Gray from Boston, Dec. 20, 1765. Samuel Adams, Writings,

may have had regarding the application of due process to the last two, they were sure it applied to the first. We may almost say that the chief element of this protection was for them a jury trial at common law.[37] In their resolutions and petitions the colonial bodies frequently referred to Magna Carta as guaranteeing trial by peers, even though no section was specified.[38] The pamphleteers, however, not uncommonly referred unmistakably to the thirty-ninth chapter,[39] and sometimes quoted it entire to prove their point.[40] There is considerable evidence also that the

Vol. I, p. 65. The letter adds: "and to these Rights the Colonists are intitled by Charters, by Common Law, and by Acts of Parliament."

[37] In the margin of the copy of Coke's second Institute (6th ed., London, 1681), which was owned by James Otis, there is a hand pointing to the part dealing with the 29th (39th) chapter of Magna Carta. The words "This ordinary and precious trial *Per Legem Terrae*" are underlined together with the words "Action of false imprisonment." In the margin there is written in the hand of James Otis, "i. e. Tr. pr. Pares." Quincy (Mass.) 483-485.

[38] "The invaluable rights of taxing ourselves, and trial by our peers, of which we implore your Majesty's protection, are not, we most humbly conceive unconstitutional; but confirmed by the Great Charter of English Liberty." Petition from the Stamp Act Congress to the King, engrossed Oct. 22, 1765. Authentic Account of the Proceedings of the Congress held at New York, in MDCCLXV on the Subject of the American Stamp Act (1767) in Almon, Tracts, Vol. II, No. 2, p. 14; Collection of Interesting, Authentic Papers, p. 30. "Resolved N. C. D. That the vesting an authority in the courts of admiralty to decide in suits relating to the stamp duties and other matters foreign to their proper jurisdiction, is highly dangerous to the liberties of his Majesty's American subjects, contrary to Magna Carta, the great charter and fountain of English liberty, and destructive of one of their most darling and acknowledged rights, that of Trials by Juries." Resolution of Assembly of Pennsylvania, Sept. 21, 1765. Collection of Interesting, Authentic papers, p. 21; (Knox) Controversy Between Great Britain and her Colonies, p. 93. See also the Answer of the House of Representatives of Massachusetts to the Governor's Speech, Oct. 23, 1765, Samuel Adams, Writings, Vol. I, p. 20.

[39] John Adams' argument, Quincy (Mass.) 460; Instructions of Boston Town Meeting to members of House of Representatives, May 15, 1769, John Adams, Works, Vol. III, pp. 505-510; "Clarendon" (John Adams) Boston Gazette Supplement, Jan. 13, 1766, John Adams, Works, Vol. III, pp. 471, 472.

[40] Instructions of the Freeholders of Boston to their Representatives, May 8, 1769, American Gazette, pp. 374, 375; John Adams, Works, Vol. III, pp. 507-510; Instructions of the Town of Braintree to their Representatives, Sept. 24, 1765, John Adams, Works, Vol. III, pp. 466, 467. This resolution was adopted "in so many words" in forty towns in Massachusetts and Samuel Adams drew upon it for the Boston Instructions. John Adams, Diary, Works, Vol. II, pp. 152-154. Letter from the Massachusetts House of Representatives to Benjamin Franklin, Nov. 6, 1770, Boston Gazette, July 22, 1771, Samuel Adams Writings, Vol. II, pp. 52, 53.

colonists considered the "law of the land" as a reference to the common law, and hence an attempt to impose the civil law upon them, except in those cases where it had been recognized by the English common law was illegal.[41] The civil law without trial by jury was applied only in America, while the mother country still had the regular forms of judicial procedure. This greatly incensed the colonists for they considered it an entirely arbitrary and unjust classification and hence particularly inimical to due process of law.[42]

The colonists rested their case on the fundamental rights of Englishmen according to the British constitution. They assumed this foundation to be immutable and looked upon the protections of the Great Charter as one of its chief parts, the cornerstone of which was the "law of the land" article. Upon this cornerstone they based their claims to many of their most cherished privileges such as the right to the common law, the right of protection against unjust discrimination on the part of the legislature, the right to a

[41] Instructions of the Freeholders of Boston to their Representatives, May 8, 1769, American Gazette, pp. 374, 375; John Adams, Works, Vol. III, pp. 507-510; "Clarendon" (John Adams) Boston Gazette Supplements, Jan. 13, 1766; John Adams, Works, Vol. III, pp. 471, 472; Instructions of Freeholders of Boston to their Representatives, May 15, 1769, John Adams, Works, Vol. III, pp. 505-510.

[42] John Adams argued that the writs of assistance provided for trial "not by a jury, not by the Law of the Land, but by the civil Law, and a Single Judge. Unlike the ancient Barons who una Voce Responderunt, Nolumus Leges Angliae mutari—the Barons of modern Times, have answered, that they are willing, that the Laws of England should be changed, at least with Regard to all America, in the most tender Point, the most fundamental Principle. . . . Here is the Contrast that stares us in the Face! The Parliament in one Clause guarding the People of the Realm, and securing to them the benefit of a Tryal by the Law of the Land, and by the next Clause depriving all Americans of that Priviledge. What shall we say to this Distinction? Is there not in this Clause, a brand of Infamy, of Degradation, and Disgrace, fixed upon every American? Is he not degraded below the Rank of an Englishman? Is it not directly a Repeal of Magna Charta, as far as America is concerned." He then cited the thirty-ninth chapter of the Great Charter and Coke's commentary on it. Advocate General v. Hancock, Quincy (Mass., 1769), 460. See also: Instructions of the Town of Braintree to their Representatives, Sept. 24, 1765 (adopted "in so many words" in forty other Massachusetts towns), John Adams, Works, Vol. III, pp. 466, 467; Vol. II, pp. 152-154; House of Representatives of Massachusetts to Benjamin Franklin, Nov. 6, 1770, Boston Gazette, July 22, 1771; Samuel Adams, Writings, Vol. II, pp. 52, 53.

voice in levying their taxes, and the right to a trial by jury. It matters little if they were historically correct in their interpretation of this chapter, for the important consideration in the development of due process of law is not so much its original meaning as what the founders of our country considered the content of that phrase to be. In so far as they gave it a content, it was this meaning that they transferred with it to the American state constitutions and later to the Federal Constitution in the Fifth Amendment. It was the attempt of the English government to tear away these rights from the cornerstone of English liberty that led directly to the American Revolution.

§ 52. It was inevitable that many of the concepts of due process of law which had been stressed during the controversies immediately preceding the opening of the War for Independence should continue during it. The Declaration of Independence may be looked upon as the culmination of the protests raised by individuals and quasi-governmental organs against the supremacy of Parliament in the preceding fifteen years. The doctrine that whatever Parliament declares is the law of the land continued to be the center of attack up to 1776.[43] The colonists cited Locke's Two Treatises on Civil Government as the supreme authority in matters of political theory,[44] and the most important colonial treatise on general political science before the Declaration of Independence was imbued with this doctrine, evidently taken over bodily

[43] Blackstone's doctrine of parliamentary supremacy was bitterly attacked as being contrary to constitutional government. Samuel Estwick, Letter to the Reverend Josiah Tucker, D. D., Dean of Glocester (London, 1776), pp. 191, 192.

[44] Report of the Committee on the Rights of the Colonists to the town meetings of Boston, Nov. 20, 1772, Votes and Proceedings of the Freeholders and other Inhabitants of the Town of Boston (Boston, 1773), pp. 9, 10; Samuel Adams, Writings, Vol. II, pp. 350-369. This report was adopted at the town meeting over which John Hancock presided. Even the loyalists took great pains to explain away Locke's words in this connection, but they did not deny his authority. (W. Knox.) The Controversy between Great Britain and her Colonies, pp. 31-37.

from Bolingbroke.[45] Magna Carta was still considered the foundation of their political liberty and the most important part of the English constitution.[46]

It was, however, rather to the spirit of the Great Charter than to particular parts of it that they appealed. This document, being founded on the common law,[47] embodied the spirit of constitutional government[48] rather than the letter of their rights.[49] Even in the question of taxation, which had caused so many references to the Charter in the previous decade, we find few specific allusions to it,[50] or to its principles.[51] As the revolution gained momentum

[45] J. Burgh, Political Disquisitions (Phila., 1775), Vol. I, p. 221; Vol. II, p. 310; Vol. III, pp. 441, 442. He quotes the passage from Bolingbroke which has been quoted above. Sec. 22, n. 47.

[46] The first Continental Congress thought it would be appropriate to represent Magna Carta as the pedestal upon which the column and cap of liberty were to be raised by the aid of the hands of the twelve colonies. This medallion, under which was the motto *"Hanc Tuemur, Hac Nitimur"* was engraved, was reproduced on the title page of their journal by order of the Congress Henry Baldwin, General View of the Origin and Nature of the Constitution (Phila., 1837), p. 6; R. C. Hurd, Writ of Habeas Corpus (Albany, 1858), pp. 105-108. Likewise the committee which was appointed in Massachusetts to report on a colonial seal, James Otis being chairman, decided to recommend one which included an "English-American" holding a sword in the right hand and a scroll in the left. Upon this scroll were the words "Magna Charta." This report was accepted July 28, 1775. In 1776 the word "Ind" (Independence) was substituted for "Magna Charta." Quincy (Mass.) 468. See also the Communication from the Committee of Rowan County at Salisbury to the Committee of Mecklenburg County (Ch. 1775) Saunders and Clark, Records of North Carolina, Vol. X, p. 11.

[47] In his controversy with William Brattle over the independence of the judiciary, John Adams pointed out carefully that the Great Charter was founded on and confirmed the great body of the common law. Boston Gazette, Feb. 1, 1772; John Adams, Works, Vol. III, p. 542.

[48] Presentation of the House of Representatives of Massachusetts to the Governor, Jan. 26, 1773; Boston Gazette, Feb. 1, 1773, Samuel Adams, Writings, Vol. II, pp. 420, 421; Presentation of the House of Representatives of Massachusetts to the Governor, March 2, 1773; Boston Gazette, March 8, 1773; Samuel Adams, Writings, Vol. II, p. 435.

[49] Estwick, Letter to Reverend Josiah Tucker, pp. 87-90.

[50] The one in Burgh, Political Disquisitions, Vol. II, p. 310, seems to be the only one after 1772 and this book is a sort of a summary of the colonial political views of *ante-bellum* days.

[51] "To take any man's money, without his consent, is unjust and contrary to reason and the law of God, and the Gospel of Christ; it is contrary to Magna Carta, or the Great Charter and Constitution of England; and to complain, and even to resist such a lawless power is just, and reasonable, and no rebellion.

"But it is said, that the Parliament of England has supreme power and

the conviction grew that precedents, and among them the Great Charter itself, did not furnish a safe guide. This was partly because it was perceived that there were no real precedents for the colonial difficulties,[52] although there were plenty of false precedents readily available for those having money to pay for their discovery,[53] and partly because the rights of mankind were so comprehensive that any attempt to write them definitely into a statute must necessarily be incomplete.[54] As Hamilton had put it, "The Sacred Rights of Mankind are not to be rummaged for among old parchments or musty records.

that no one ought to resist. This we allow, while they make acts that are reasonable, and according to the British Constitution; but their power has bounds and limits, that they must not exceed: they are limited by the Laws of God and of reason; they are limited by the fundamental laws of the constitution; and by the Great Charter of England. They may not enact that the King shall take the money of his English subjects without their consent. They may not enact that English subjects shall be deprived of a trial by juries. Would they adventure to pass such unconstitutional Acts, all England would complain and remonstrate; and if they did not repeal them, they would pull down the parliament house over their ears." An Address to the Ministers and Presbyterian Congregations in North Carolina from the Presbyterian ministers in Philadelphia, July 10, 1775. Saunders and Clark, Records of North Carolina, Vol. X, p. 224. America's Appeal to the Impartial World (Hartford, 1775), pp. 11-13.

[52] "The Question is, what Right of Legislation they [English Parliament] have over us, and how they acquired and became established in such Right? —And here for the Resolution of this Question, 'tis a vain Thing to look into their Magna Carta; for this new American World, A Thousand Leagues distant from them, was not discovered till long since that Charter was granted. And if we look into our own Charters, we don't find the Parliament of England or Great Britain so much as named in them. . . ." Benjamin Prescott, A Free and Calm Consideration of the Unhappy Misunderstandings and Debates, which have of Late Years arisen, and yet subsist, between the Parliament of Great Britain, and these American Colonies (Salem and London, 1774), pp. 11, 43, 44.

[53] The Fall of British Tyranny: or American Liberty Triumphant, a Tragi-comedy of five acts (Phila., 1776), p. 7.

[54] "I am sorry to observe an appeal to the spirit of our constitution treated with ridicule, and an attempt made to substitute in place of this only genuine authority, the letter of the statutes or even of Magna Charta itself; for these may all be imperfect, though as I have proved in a former letter the spirit of the constitution can not." (John Cartwright), American Independence the Interest and Glory of Great Britain (Phila., 1776), Revolutionary War Pamphlets, Vol. XVII, No. 1, pp. 75-77.

"Vague and uncertain laws, and more especially Constitutions, are the very instruments of slavery. The Magna Carta of England was very explicit, considering the time it was formed, and yet much blood was spilt in disputes concerning its meaning." "Candidus," Additions to Common Sense (Phila., 1776), p. 82; Samuel Adams, Writings, Vol. III, p. 262.

They are written, as with a sunbeam, in the whole volume of human nature, by the Hand of the Divinity itself, and can never be erased or obscured by mortal power."[55] Many of the most important writers in the heat of the revolutionary movement make no mention of the Great Charter,[56] and some of the more radical even showed a contempt for written charters in general,[57] and Magna Carta and the Bill of Rights in particular.[58]

§ 53. It is only in the subject of trial by jury that we find in any considerable number of instances continued appeals to the Great Charter as a constitutional document. Not only is it cited in general as securing this procedure,[59] but sometimes the thirty-ninth chapter is quoted at length[60]

[55] Because this is so, he declared that it made no difference if the rights of the colonists were contained in the Great Charter or not. Alexander Hamilton, The Farmer Refuted (N. Y., 1775). Works (ed. by Lodge), Vol. I, p. 113; (edition by Hamilton), Vol. II, pp. 79, 80.

[56] Thomas Jefferson does not speak of it. John Dickinson, in the famous "Farmers Letters" does not mention it. Thomas Paine seems not to have considered it worth while to cite in his important tracts "Common Sense," and the "American Crisis." Patrick Henry makes no mention of it during this period.

[57] Patrick Henry, Speech on the question of sending the Virginia Resolutions to Parliament, 1765. John Fiske, American Revolution, Vol. I, p. 22.

[58] Thomas Paine, Rights of Man (Phila., 1791), Part II, ch. IV (Dutton's edition, pp. 191, 192). It should be noted, however, that Paine seems to have looked very favorably toward certain parts of the Great Charter for many ideas from it were incorporated in the French Declaration of Rights of Man and of Citizens. The American influence on this declaration was very great. Emile Walch, *La Declaration des droits de l'homme et du citoyen et l'assemblee constituant travau preparatoires* (Paris, 1903), pp. 202 ff; Emile Boutmy, *Etudes politiques* (Paris, 1907), pp 141-163. It is said that the draft as submitted by Condorcet was largely the work of Paine. M. D. Conway, Life of Thomas Paine (N. Y., 1892), Vol. II, pp. 39-41. It is certain that Paine thought very highly of this declaration. Rights of Man (Dutton's edition), pp. 93-100.

[59] Burgh, Political Disquisitions, Vol. III, p. 253; The House of Representatives of Massachusetts to the Governor, Jan. 26, 1773, Samuel Adams, Writings, Vol. II, pp. 420, 421.

[60] "Resolved, That trial by juries of the vicinity is the only lawful inquest that can pass upon the life of a British subject and that it is a right handed down to us from the earliest stages confirmed and sanctified by Magna Charta itself that no freemen shall be taken and imprisoned or dispossessed of his free tenement and Liberties or outlawed or banished or otherwise hurt or injured unless by the legal judgment of his peers or by the law of the land, and therefore all who suffer otherwise are not victims to public justice but fall a sacrifice to the powers of Tyranny and highhanded oppression." Resolution of the First Provincial Convention or Congress of North

and occasionally the "law of the land" is specified.[61] One must not conclude, however, that the phrase "due process of law" had come to have a settled meaning in the colonies that would limit its application to the single protection involved in a jury trial. Indeed, trial by jury was frequently petitioned for or demanded without any reference to Magna Carta.[62] Again, the "law of the land," and more often the Great Charter itself, was cited as securing more than a mere trial by jury, namely, the fullest and fairest trial according to the time-honored principles of the common law.[63] For this reason there was objection to bills of attainder and arbitrary decrees of the legislative body which were not considered the laws of the land, because they were not the result of an impartial common-law trial.[64] It is evident that due process of law had a wider connotation than a single form of trial.

Carolina held at New Bern, Aug. 27, 1774. Saunders and Clark, Records of North Carolina, Vol. IX, 1045.

[61] Address from the First Continental Congress to the People of Ireland, Philadelphia, July 28, 1775. The Declarations of the Representatives of the United Colonies of North America, now met in General Congress at Philadelphia (London, 1775), p. 26. Cited in State v. Beswick, 13 R. I. 211 at 220.

[62] See the resolutions of the town meetings at Halifax, Aug. 22, 1774, of Granville County, Aug. 15, 1774, of Johnson County, Aug. 12, 1774. Saunders and Clark, Records of North Carolina, Vol. IX, pp. 1031, 1035, 1038, 1039.

[63] *Junius Americanus*, "To the People of England" Boston Evening Post, Jan. 28, 1771. Notice also the following interpretation of due process of law: "By this no freeman might be molested in his person, liberty or estate, but according to the laws of the land, by lawful warrant, granted by lawful authority, expressing the cause for which, the time, when, and the place where, he is to answer or be imprisoned, with the terms of his enlargement; nor have sentence passed upon him in any case, but by lawful judgment of his peers; who in the instance of giving their verdict, do unanimously declare and announce the law with respect to themselves in like circumstances. . . . English subjects, therefore, could be bound by no laws, liable to no taxes, but what were made and imposed by their own consent; nor have sentence passed upon them but by the judgment of their equals. Glorious constitution worthy to be engraved in capitals of gold, on pillars of marble; to be perpetuated through all time, a barrier, to circumscribe and bound the restless ambition of aspiring monarchs, and the palladium of civil liberty. . . ." America's Appeal to the Impartial World (Hartford, Printed by Ebenezer Watson, 1775), pp. 11-13.

[64] The acts which confiscated the property of loyal British subjects who went into exile were not valid because there was no opportunity for notice and hearing. The "law of the land," "due process of law," and

§ 54. With one or two notable exceptions, all of the pamphlets and resolutions mentioning the Great Charter and due process of law were published before July 4, 1776. The severance of the ties which bound the colonies to Great Britain, caused the drawing up of a "Bill of Rights" in many states. In many of these documents a paraphrase of the due process provision was included.[65] These clauses remained practically uninterpreted until after the Federal government was established under the Constitution of 1787. The constitutional struggle of the colonies over the meaning of due process of law was thus practically ended in 1775, when the resistance to royal authority caused many of the governors to flee to the decks of waiting warships, leaving the government in the hands of the self-constituted committees of correspondence. In nearly every case, it had been the presence of royal or proprietary governing officials that had led to conflicts concerning the meaning of this phrase. Frequently the conflicts had centered around the question of the exercise of arbitrary power by these officials, and in other cases it was the possibility of an appeal to England that led to the effort to use the sacred rights of Magna Carta to buttress the colonies' position. Indeed the colonies had invoked the protection of that document in such a variety of cases and under such a variety of conditions that to say they had any definite concept of the meaning of any portion of it is impossible. It is certain that it did not mean the same thing to everyone.

There are, however, some general observations which can be made. It seems quite certain that a trial by jury

"due course of law" require a notice and hearing before a man can be condemned to lose his property. Cassius, supposed to be written by Aedanus Burke, Esq., one of the Chief Justices of the State of South Carolina, An Address to the Freemen of the State of South Carolina (Phila., 1783), pp. 17-19. See also the Report of the Committee on the Rights of the Colonists to the Town meeting of Boston, Nov. 20, 1772. Votes and Proceedings of the Freeholders and other Inhabitants of the Town of Boston, pp. 9, 10; Samuel Adams, Writings, Vol. II, pp. 350-369.

65 James Schouler, Constitutional Studies, State and Federal (N. Y., 1904), pp. 29-43. See *supra* sec. 6.

according to the regular forms of the common law was considered essential to due process. There is also little question that the colonists looked upon the "law of the land" as being the common law of England and that it embodied the general rights and privileges of Englishmen. Due process of law in this light appears to be a catch-all phrase for human rights rather than a phrase with a well defined content. Nevertheless, its ambiguity must not be taken to prove that the colonists did not consider that it limited the legislative bodies as well as the executive or judiciary. The evidence on this matter is clearly all on one side. Practically without exception, strenuous objections were raised whenever the colonists were met with a situation involving a legislative violation of due process of law. So overwhelming is the proof of the importance of this protection in this regard that it is difficult to understand how there would have been any serious question regarding it when the courts considered it a half century later. It was, indeed, the very importance which was universally attached to the thirty-ninth section of the Great Charter that produced its complexity. This complexity, it carried with it into the fundamental law of the new nation.

PART FOUR.

EXTRA-JUDICIAL INTERPRETATION OF DUE PROCESS.

CHAPTER IX.

THE FEDERAL GOVERNMENT.

§ 55. The history of the due process clause during the period of the formation of the Federal Union must be traced largely by inference. In erecting the frame of government for the Northwest Territory, the Continental Congress incorporated such a clause. But the careful studies which have been made of the records left by this body give us no clue to the meaning which was attached to the phrase.[1] The section incorporated in the Northwest Ordinance was taken almost *verbatim* from the Bill of Rights of Virginia. Because of its close textual connection with certain other procedural protections for persons accused of crime,[2] one might be led to think that it was con-

1 Three committees were instrumental in drawing up the Northwest Ordinance. The first reported it without any safeguards against governmental tyranny. The second incorporated the protections of *habeas corpus* and trial by jury. The third included the clause as adopted. As thus reported, the ordinance was passed unanimously by states (only Mr. Yates of New York voting against it) on July 11, 1787. Journal of the Continental Congress, Vol. XII, pp. 57-63; J. M. Merriam, "Legislative History of the Ordinance of 1787," American Antiquarian Society Proceedings, Vol. V, N. S. (Apr., 1888), pp. 303-347. See also J. A. Barrett, "Evolution of the Ordinance of 1787," University of Nebraska Seminary Papers, April, 1891 (N. Y., 1891), pp. 49-63, and W. H. Smith, Life and Public Services of Arthur St. Clair (Cincinnati, 1882), Vol. I, pp. 117-131.

2 The wording of the section follows:

Article II. "The inhabitants of the said territory shall always be enti-

sidered merely as procedural protection. Likewise, the fact that trial by jury and the well known "proceedings according to the course of the common law" are especially provided for, might seem to imply that it was neither of these protections which the framers of the article had in mind. Neither of these assumptions, however, seems to be warranted. In the first place, the framers of the bills and drafters of legislation in the formative years of our government were by no means as punctilious in the observance of the subtilities of statutory construction as one might wish. To say, therefore, that no two parts of a document were expected to cover the same ground, is to attribute to the legislators of this period a wisdom which, unfortunately, they did not possess. In the second place, there seems to have been a universal tendency in this period to put ambiguous, general, and abstract clauses in protections of this sort for good measure. Although the protection of trial by jury appeared in the Federal Constitution as adopted a few months later,[3] one of the chief objections to that document was that it contained no general reservation of rights to the people. In the third place, there is evidence that some of the citizens of the confederation considered a jury trial as part of the protection of the law of the land.[4]

tled to the benefits of the writs of *habeas corpus*, and of the trial by jury: of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law . . . no man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same . . . ." F. N. Thorpe, The Federal and State Constitutions, Colonial Charters and other Organic Laws (Wash., 1901), Vol. II, pp. 960, 961.

[3] Article III, sec. 2, cl. 3; See also Amendments, art. VI, art. VII.

[4] William Pierce wrote to St. George Tucker from New York, Sept. 28, 1787:

"The absolute rights of Englishmen are founded in nature and reason, and are coeval with the English Constitution itself. They were always understood and insisted on by them as well without as with a Bill of Rights. This same spirit was breathed into the Americans, and they still retain it, nor will they, I flatter myself, ever resign it to any power, however plausible it may seem." In speaking of the trial by jury, he wrote: "An Englishman to be sure will talk of it in raptures; it is a virtue in him to do so, because it is

§ 56. When we turn to the formation of the federal constitution, we are nearly as much in the dark. The most careful study of the records of the Federal convention of 1787, as left us in the Journal of the Convention and Madison's Debates,[5] fails to disclose a single time when this clause was mentioned in that body during the entire four months of its sitting. This conspicuous absence of the phrase is especially significant when we consider how large it had bulked in English and colonial history during the previous century and a half. Indeed, the lack of a Bill of Rights was not mentioned in the convention until the sitting of that body was nearly three-fourths over,[6] and it can not be said that there was anything like a movement for the incorporation of such provisions until the very end of the session. This movement was unsuccessful, Gerry's motion to appoint a committee to draft the Bill of Rights being overwhelmingly defeated.[7] Although it can not be doubted that there was some positive opposition to such an article,[8] the principal cause of its defeat was not the antagonism of the members toward it.[9] There seems to have been a feeling that it would unduly prolong the sessions to take up this problem adequately and that there

insisted on in Magna Charta (that favorite instrument of English liberty) as the great bulwark of the nation's happiness. But we in America never were in a situation to feel the same benefits from it that the English nation have. We never had anything like the Norman trial by battle, nor great Lords presiding at the heads of numerous tribes of tenants whose influence and power we wished to set bounds to." Pages 315, 316. American Historical Review, Vol. III (Jan., 1898), pp. 313-317.

5 Debates in the Federal Convention, by James Madison. These are most conveniently obtainable in Max Farrand, Records of the Federal Convention, 1787 (New Haven, 1911).

6 The first proposal for a Bill of Rights was made when Pinkney submitted a number of provisions for one to the House on August 20. These were referred to the committee on detail. Farrand, Records, Vol. II, p. 340.

7 All the states voted against it except Massachusetts whose delegates were absent at the time. Farrand, Records, Vol. II, p. 588.

8 C. C. Nott, The Mystery of the Pinckney Draught (N. Y., 1908), 207. See also the argument of C. C. Pinkney in the South Carolina Ratifying convention. J. Elliot, Debates of the State Conventions which ratified the Federal Constitution (Wash., 1836), Vol. IV, p. 316.

9 Washington in a letter to LaFayette, Apr. 28, 1788, declared that none of the members of the convention had any objections to the provisions but merely considered them superfluous. Farrand, Records, Vol. II, pp. 297, 298.

was little need for it.[10] It should also be remembered that the country was by no means unitedly in favor of the Constitution. To admit the strength of the proposed federal government by inserting important provisions to limit it, might result in the defeat of the whole instrument.[11]

Colonel George Mason of Virginia, a politician of unusual shrewdness, had led the movement for a Bill of Rights in the convention. It is probable that he saw in the lack of this Article an effective campaign argument to be used against the new instrument.[12] We do not know just what provisions were most desired by those fostering this movement but inasmuch as its most persistent leader had drafted the Virginia Bill of Rights, we may reasonably infer from that instrument the scope of the protections desired. Likewise from his argument in the convention, it is evident that Colonel Mason desired to protect the people of the states from arbitrary governmental action from whatever source it might come.[13] Later he even went so far as to maintain that without a Bill of Rights the people would not be protected in their

[10] James Wilson declared (Nov. 28, 1787) that the lack of a Bill of Rights "which has since occasioned so much clamor and debate, never struck the mind of any member in the late convention till, I believe, within three days of the dissolution of that body, and even then of so little account was the idea that it was passed off in a short conversation without introducing a formal debate or assuming the shape of a motion....

"A bill of rights is neither an essential nor a necessary instrument in framing a system of government, since liberty may exist and be as well secured without it." J. B. McMaster and F. D. Stone. Pennsylvania and the Federal Convention (Phila., 1888), pp. 253, 254. See also *Ibid.*, pp. 313-338.

[11] A. C. Hanson, "Remarks on the Proposed Plan," Ford, Pamphlets, pp. 341-344.

[12] That he had his eye on popular approval is evident from his statement that a Bill of Rights "would give great quiet to the people." Farrand, Records, Vol. II, pp. 582-588. James Iredell claimed that Mason was insincere in his demands for a Bill of Rights for he had opposed the *ex post facto* provision of the Constitution. P. L. Ford, ed., Pamphlets on the Constitution of the United States (Brooklyn, 1888), p. 335. He also opposed the obligation of contracts clause. W. B. Hunting, The Obligation of Contracts Clause in the United States Constitution (Baltimore, 1919), p. 119.

[13] Farrand, Records, Vol. II, pp. 582-588. In answering Mason's argument Mr. Sherman declared that a Bill of Rights was unnecessary because the state Bills of Rights were still in force, and because "the legislature can be safely trusted."

common-law privileges which would certainly indicate that he feared legislative as well as judicial and executive tyranny.[14]

When the proposed Constitution was referred to Congress with the request that it be sent to the various states, another attempt was made to insert a Bill of Rights.[15] This failed because of the doubtful validity of such amendments when proposed by Congress, and the document as referred to the states for ratification, left still the loophole through which anti-federalist darts might be shot.

§ 57. As soon as the proposed constitution was made public its supporters began to flood the country with pamphlets, books, newspaper articles, and speeches, praising the new instrument beyond all reason.[16] These extravagant statements did much to turn many against the Constitution.[17] However, this flood of propaganda was followed by a second deluge in which the anti-federalists proved themselves fully as bitter in their opposition to the new instrument as its advocates had been fulsome in its praise.

In all this literature there has not been found a single mention of due process of law. In some instances, indeed, the writers went into considerable detail as to just what should be included in a Bill of Rights,[18] and one even pro-

14 See his formal statement to his constituents setting forth the reasons why he refused to sign the Constitution. Farrand, Records, Vol. II, p. 637; Ford, Pamphlets, p. 329.

15 Madison wrote to Washington from New York, Sept. 30, 1787: "An attempt was made in the next place [in the Continental Congress] by R. H. L., [ee] to amend the act of the convention before it should go forth from Congress. He proposed a Bill of Rights, provision for juries in civil cases, and several other things corresponding with the ideas of Colonel Mason. He was supported by Mr. Melancthon Smith of this State." James Madison, Papers (ed. by H. D. Gilpin, Wash., 1840), Vol. II, pp. 644, 645.

16 This was especially true in New England but it was also true in the Middle Colonies. S. B. Harding, Federal Constitution in Massachusetts (N. Y., 1896), p. 17; Letter of Madison to Randolph, Oct. 7, 1787. Madison, Papers, Vol. II, p. 647.

17 Harding, Federal Constitution in Massachusetts, p. 17, n. 2, 67; F. S. Drake, Life of Henry Knox (Boston, 1873).

18 Omission of statements guaranteeing freedom of religion, liberty of the press, and trial by jury were the most common in these criticisms.

posed to make all the state Bills of Rights a part of the Federal Constitution.[19] When it is considered, however, that in few cases where the proposed amendments worked out in detail, and that nearly every one of the writers declared that there were other rights than the ones mentioned which should be protected, the absence of this important provision from Magna Carta is not so surprising. In many cases there seems to have been a definite proposal to omit a detailed description of what was desired; merely to denounce the "lack of a Bill of Rights" had a superior political effect.

In spite of the rather nebulous concept which the anti-federalists had of the contents of the Bill of Rights, there is abundant evidence to show that it was expected that those articles should apply to the legislature as well as to the other organs of government. It was a favorite contention that the power of Congress over both the states and the individuals was much too great.[20] To prevent the

Anonymous H. H. (Brackenridge), American Museum, Apr., 1788, F. L. Ford, Essays on the Constitution of the United States (Brooklyn, 1892) p. 320; R. H. Lee, "Letters from the Federal Farmer to the Republicans," (1787); Brutus, II., "Spirit of the Press," Journal of the Massachusetts Convention on the Federal Constitution, pp. 380-384; Luther Martin, "Reply to the Landholder," March 19, 1788; Farrand, Records, Vol. III, pp. 286-295. "Declaration of Principles of the Anti-Federalists of New York," C. C. Miner, Ratification of the Federal Constitution in New York, Columbia University Studies, Vol. XCIV (1921), p. 459. Other omissions mentioned were: excessive bail, guarantee of notice in case of criminal prosecution, subordinate military power, free elections, habeas corpus. (James Winthrop and James Warren), "Disadvantages of Federalism upon the New Plan," American Herald, Nov. 19, 1787, quoted in Harding, Federal Constitution in Massachusetts, pp. 53, 54; Agrippa (James Winthrop), Massachusetts Gazette, Feb. 5, 1788, Ford, Essays, pp. 117-119; Hampden (James Sullivan), Massachusetts Centinel, Jan. 26, Feb. 2, 1788; quoted in Harding, Federal Constitution in Massachusetts, pp. 31, 32; "Cornelius" Hampshire Chronicle, Springfield, Dec. 11, 1789, *Ibid.*, pp. 119-124, "Republican," Independent Gazette (N. Y.), May 2, 1788, cited in G. A. McDyess, Conflict over the Ratification of the Federal Constitution in the State at New York (n. d. n. p.), p. 11.

[19] Agrippa (James Winthrop) proposed a Bill of Rights of fourteen articles, article 13 of which read: "Nothing in this Constitution shall deprive a citizen of any state of the benefit of the rights established by the constitution of the state in which he shall reside, and such Bill of Rights shall be considered as valid in any court of the United States where they are pleaded." Massachusetts Gazette, Feb. 5, 1788, Ford, Essays, pp. 117-119.

[20] See the series of articles of John de Witt, American Herald (Boston,

majority trampling the rights of the minority under foot in an arbitrary manner,[21] it was considered necessary to limit the legislative body by principles of liberty which were based upon the fundamentals of the common law and Magna Carta.[22] One writer went so far as to stress the fundamental rights of life, liberty, and estate,[23] and the minority members of the Federal Convention from Pennsylvania incorporated a due process article in their series of proposals. This seems to have been the only instance of a direct reference to the thirty-ninth article of Magna Carta by these writers.[24]

Massachusetts), Oct., Nov., Dec., 1787, quoted in Harding, Federal Constitution in Massachusetts, pp. 24, 25. Thomas B. Wait, Falmouth Gazette, *Ibid.*, p. 39; *Ibid.*, pp. 40-42; Journal of the Massachusetts Convention, pp. 280-284. Luther Martin, Maryland Journal, March 21, 1788, Ford, Essays, p. 265; Farrand, Records, Vol. III, pp. 286-295. Agrippa's (James Winthrop) argument in the Massachusetts Gazette (Jan. 14, 1788), is especially in point. "Any system therefore which appoints a legislature, without any reservation of the rights of individuals, surrenders all power in every branch of legislation to the government. The universal practice of every government proves the justness of this remark; for in every doubtful case it is an established rule to decide in favour of authority. The new system is, therefore, in one respect at least, essentially inferior to our state constitutions. There is no Bill of Rights, and consequently a continental law may controul any of those principles which we consider at present as sacred; while not one of those points in which it is said that the separate governments misapply their power, is guarded." Ford, Essays, p. 95.

21 Agrippa (James Winthrop) declared, "A Bill of Rights ought to set forth the purposes for which the compact is made, and serves to secure the minority against the usurpation and tyranny of the majority." Massachusetts Gazette, Feb. 5, 1788, Ford, Essays, pp. 117-119.

22 Melancthon Smith, "An address to the People of the State of New York; showing the necessity of making Amendments to the Constitution," Ford, Pamphlets, p. 114, Cf. the views of Mason, Ford, *Ibid.*, p. 329; "Letter of Centinel, No. II, Freeman's Journal, Oct. 24, 1787, McMaster and Stone, Pennsylvania and the Federal Constitution, p. 589."

23 A "Republican Federalist" (James Warren) writing a series of articles in the Massachusetts Centinel, declared in his third article published Jan. 9, 1788: "Of all compacts, a Constitution or frame of government, is the most solemn and important, and should be strictly adhered to. The object of it is the preservation of that property, which every individual of the community has in his life, liberty, and estate: Every measure therefore, that only approaches to an infraction of such a covenant ought to be avoided, because it will injure that sacred regard to the Constitution which should be deeply impressed on the minds of the whole community." Harding, Federal Constitution in Massachusetts, pp. 144, 145.

24 This article (No. 3) was a long section protecting the rights of those accused of crime and concluded: "and, that, no man be deprived of his liberty, except by the law of the land, or the judgment of his peers," Penn-

The burden of the argument of those who favored the constitution was that a Bill of Rights was entirely unnecessary. Some declared that even if enacted, it would not limit the legislature[25] and certainly not the sovereign people.[26] Furthermore it was pointed out that the whole constitution, and especially the preamble, was a protection of popular rights,[27] and to make a further enumeration, beyond those already mentioned in the body of the constitution,[28] would be exceedingly dangerous; for some of the rights might be omitted by accident and as a result the courts would infer, by virtue of the *ejusdem generis* rule, that the constitution did not cover them. In this way the value of the general declaration in the preamble of the constitution might be lost.[29]

§ 58. The discussion in the conventions called by the state legislatures to ratify the proposed constitution follows rather closely the lines of argument which had ap-

sylvania Packet and Daily Advertizer, Dec. 18, 1787. Quoted in McMaster and Stone, Pennsylvania and the Federal Constitution, p. 461.

[25] "Countryman" (Roger Sherman), New Haven Gazette, Nov. 22, 1787, Ford, Essays, pp. 218-220. He declared: "The only real security that you can have for all your important rights must be in the nature of your government. If you suffer any man to govern you who is not strongly interested in supporting your privileges, you will certainly lose them. . . . No Bill of Rights ever yet bound the supreme power longer than the honeymoon of a new married couple, unless the rulers were interested in preserving the rights; and in that case they have always been ready enough to declare the rights and preserve them when they were declared." See also the argument of "Cassius" (James Sullivan) in the Massachusetts Gazette, Nov. 23, 1787; Ford, Essays, p. 96.

[26] "Landholder" (Oliver Ellsworth), Massachusetts Courant, Dec. 10, 1787; Ford, Essays, 163. Iredell, Ford, Pamphlets, 335; G. J. McRee, Life and Correspondence of James Iredell (N. Y., 1857), Vol. II, p. 186. John Jay, "An Address to the People of New York on the Constitution," Ford, Pamphlets, p. 7. Alexander Hamilton, Federalist (Lodge edition, N. Y., 1899), No. 84, pp. 533-539.

[27] Hamilton, Federalist (Lodge edition), No. 84, pp. 533-539. "Sydney" (Robert Yates), New York Journal, June 13, 1788, Ford, Essays, p. 299.

[28] Hamilton laid considerable stress on the fact that the more important rights were protected in the body of the document. Federalist (Lodge edition), No. 84, pp. 533-539.

[29] Hamilton, Federalist (Lodge edition), No. 84, pp. 533-539. See Knox v. Lee, 12 Wall. (U. S., 1870) 457, 20 L. ed. 287, where it was said that the first ten amendments proved that there were implied powers in the federal government, besides those stated.

peared in the pamphlets and newspapers.[30] In most cases the delegates avoided stating just what provisions they wanted incorporated in the Bills of Rights, for they had no desire to alienate any votes by making a specific declaration. The failure to protect trial by jury and the freedom of the press were mentioned,[31] but the central point of attack was the lack of general limitations on the power of Congress. Some feared the power of the executive,[32] and others wanted protection from the arbitrary use of any power at all;[33] but it is evident that, in the main, the fear of oppressive governmental action was confined to Congress.[34] It was especially feared that that body might abuse the wide powers of taxation which had been given them as well as its control over elections.[35]

Those supporting the proposed constitution used the arguments of Hamilton[36] over and over again. They urged that a Bill of Rights was needless due to the fact that such instruments meant little or nothing except as limitations on royal power, and as such could be changed by the legislative body.[37] Hence in a government of only dele-

30 Unfortunately it is not possible to study the temper of all the state conventions because in many cases the records of the debates have been either entirely or partially destroyed as was the case in New Hampshire, Connecticut, Vermont, and Maryland. In some states (New Jersey and Delaware) the proceedings were rather perfunctory. The remaining six states are, fortunately, the most important and the debates are rather fully given in J. Elliott, Debates of the State Conventions which ratified the Federal Constitution (Wash., 1836).

31 Smilie (Penn.) Elliott, Debates, Vol. II, p. 453; Timothy Bloodworth (N. Car.), *Ibid.*, Vol. IV, p. 180; MacDowall (N. Car.), *Ibid.*, Vol. IV, pp. 149, 210; James Lincoln (S. Car.), *Ibid.*, Vol. IV, p. 314; Patrick Henry (Va.), *Ibid.*, pp. 324-446.

32 Patrick Henry (Va.), Elliott, Debates, Vol. III, pp. 58, 59. See also the fear in Massachusetts that the privilege of the writ of habeas corpus had not been sufficiently protected. *Ibid.*, Vol. II, pp. 716-783.

33 F. S. Drake, Life of Henry Knox (Boston, 1873), p. 150.

34 Spencer (N. Car.), Elliott, Debates, Vol. IV, p. 163. Harding, Federal Constitution in Massachusetts, p. 71. Patrick Henry (Va.), Elliott, Debates, Vol. III, p. 446.

35 Harding, Federal Constitution in Massachusetts, pp. 71, 72. MacDowall (N. Car.), Elliott, Debates, Vol. IV, pp. 149, 210. Patrick Henry (Va.), *Ibid.*, Vol. III, pp. 446-448.

36 Federalist, No. 84

37 Wilson (Penn.) Elliott, Debates, Vol. II, pp. 435-438; James Iredell (S. Car.), *Ibid.*, Vol. IV, pp. 148, 149. Governor Johnston (N. Car.), *Ibid.*,

gated powers, as proposed in the Constitution, such a declaration was said to be useless and even confusing.[38] Furthermore, it was evident that should there be an attempt to enumerate the rights of the people some might be omitted, with serious consequences.[39]

The political situation went steadily against the anti-federalists, and they soon found that it would be impossible to secure the complete rejection of the proposed fundamental law. As a consequence they bent their efforts to secure ratification on the condition that certain amendments be at once adopted. This, of course, would have practically defeated the establishment of the new government and consequently was bitterly fought by the federalists. The net result in many states was a compromise in which it was agreed to recommend to the new Congress certain amendments with the hope that they would be shortly proposed to the state legislatures. Seven states drew up such lists of amendments and four of these contained the transcribed thirty-ninth article of Magna Carta.[40] In no state was there any considerable discussion

Vol. IV, p. 64. Maclaine (N. Car.), *Ibid.*, Vol. IV, p. 63. Governor Randolph (Va.), *Ibid.*, Vol. III, p. 191. John Marshall (Va.), *Ibid.*, Vol. III, p. 561.

[38] George Nicholas (Va.), Elliott Debates, Vol. III, p. 246; McMasters and Stone, Pennsylvania and the Federal Constitution, pp. 9, 10. See also arguments cited *supra*, n. 26, 37.

[39] James Iredell (N. Car.), Elliott Debates, Vol. IV, pp. 148, 149. C. C. Pinckney (S. Car.), *Ibid.*, Vol. IV, p. 316.

[40] Massachusetts offered 9 amendments; S. C., 4; N. H., 12; Va., 20; N. Y., 32; N. C., 20; R. I., 21. Rhode Island did not ratify the constitution until after the first ten amendments had been framed. H. V. Ames, "Amendments to the Constitution" American Historical Association Reports, 1896, Vol. II, p. 183, n. 3. The following due process amendments were offered. Va., sec. 9; "That no freeman ought to be taken, imprisoned, or disseised of his freehold, liberties, privileges, or franchises, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land." This was framed by a committee consisting of George Wythe, Mr. Harrison, Mr. Mathews, Patrick Henry, Governor Randolph, George Mason, Mr. Nicholas, Mr. Grayson, James Madison, Mr. Tyler, John Marshall, James Monroe, Mr. Ronald, Mr. Bland, Mr. Smith, P. Carrington, Mr. Innes, Mr. Hopkins, J. Blair, and Mr. Simms. Elliott, Debates, Vol. III, pp. 657-661. North Carolina followed Virginia *verbatim* in this amendment. *Ibid.*, Vol. IV, p. 245. Letter from Thomas Jefferson to Mr. Carmichael, Paris, December 25, 1788, Documentary History of the Constitution of the United States (Wash., 1905), Vol. V, p. 136.

of these amendments by its convention. They were usually prepared by a committee,[41] the report of which was subsequently adopted in a perfunctory manner; for it was recognized that it was only a recommendation.

§ 59. It is evident that the demand for a Bill of Rights in the Federal Constitution was a growth rather than a simultaneous outburst of opinion.[42] At first it was considered merely an excellent campaign cry. But soon it got away from its originators, and the feeling became so strong that there was no question that Congress would incorporate some such articles in proposed amendments. This sentiment, however, was nebulous. Very few specific guarantees were suggested, and in but one case was there a suggestion that due process of law should be safeguarded, until the committees in the state conventions began to frame their proposals. This ambiguity in the concepts of those in political control gave rise to the general feeling that the mere statement of specific rights would not be enough. It was necessary to go further and deeper and

New York: "That no person ought to be taken, imprisoned or disseized of his freehold, or be exiled or deprived of his privileges, franchises, life, liberty, or property, but by due process of law." Elliott, Debates, Vol. I, p. 328. Rhode Island: Sec. 9, "That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, privileges, or franchises, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the trial by jury, or by the law of the land." *Ibid.*, Vol I, p. 334. Massachusetts proposed an article safeguarding criminal procedure but did not add "due process of law." Letter from John Hancock to Benjamin Franklin, Boston, Feb. 16, 1788, Minutes of the General Assembly of Pennsylvania, 1787, 1788 (Phila., 1787, 1788), p. 1. This was also true of that proposed by New Hampshire, Elliott, Debates, Vol. I, pp. 325, 326.

[41] In Virginia the committee was composed of many of the best known leaders in the political life of the time. It however, adopted *verbatim* the amendment which Patrick Henry had earlier proposed on the floor of the convention. Elliott, Debates, Vol. III, p. 658. It follows closely the wording in the Virginia Bill of Rights. F. N. Thorpe, Constitution, Vol. VII, p. 3783.

[42] This is shown by the fact that, in the main, only those states which ratified the constitution after some deliberation, incorporated a Bill of Rights in their recommendations. Furthermore, those which adopted the constitution latest usually had the greatest number of articles in their suggestions for amendments. There was practically no discussion of a Bill of Rights in New York until well into 1788. C. E. Miner, Ratification of the Federal Constitution by the State of New York. (Columbia Univ. Studies, N. Y., 1921), Vol. XCIV, pp. 436-455.

lay down a general clause which would protect the people from any arbitrary power on the part of the government. It was not only the abuse of power by the executive that was feared, but there was fully as great a demand for protection against legislative encroachments on private rights. The rights of minority against tyrannical actions by the majority, the danger of congressional tyranny over the states, the fear of excessive and unwarranted taxation on the part of the federal government, all amply illustrate this fear of the legislature.

§ 60. When the first Congress of the new government met, it had before it proposals for 103 amendments from which to draw up a Bill of Rights.[43] Early in the session,[44] Mr. Madison, the leader of the House of Representatives, moved that the house go into a committee of the whole to consider amendments to the Constitution.[45] The objection was raised that Congress was too busy at that time to consider this matter and Madison changed his motion to provide for the appointment of select committee to report on amendments. He then presented a considerable number of amendments which he desired referred to this committee, one of which was very similar to the Fifth Amendment as finally adopted.[46]

[43] The ratification of Rhode Island did not come until May 27, 1790, so the twenty-one amendments prepared by that state were not available.

[44] June 9, 1789.

[45] Harding points out that the reason for the emphasis on a Bill of Rights was that the Americans had seen within 150 years no less than two very bloody revolutions to secure certain rights and were consequently in no humor to relinquish them in a single instrument. S. B. Harding, Federal Constitution in Massachusetts, pp. 68, 69.

Madison had early expressed himself as favoring amendments "As far as these may consist of a constitutional declaration of the most essential rights." He declared, "My own opinion has always been in favor of a bill of rights, provided it be so framed as not to imply powers not meant to be included in the enumeration." James Madison, Writings (N. Y., 1884), Vol. I. pp. 423, 424. Letter to Jefferson from New York, Oct. 17, 1788. His early concept of the proper scope of these rights may be seen from his letter to Mr. Eve, Jan. 2, 1789. He declared he believed some amendments were wise, particularly to secure "freedom of the press, trial by jury, security against general warrants," &c. Documentary History of the Constitution, Vol. V, p. 142.

[46] "No person shall be subject, except in cases of impeachment, to more

The argument advanced by Madison in favor of his list of amendments is noteworthy. He contended that these restrictions were necessary, not only on the executive power, but also on the legislative power of the new government. He admitted that in some states there had been a violation of articles similar to these by the legislature; but in spite of this he considered that the general effect was salutary in restraining the legislative branch of the government.[47] With prophetic foresight he predicted the danger of an unwieldy House of Representatives, in which case the protection of the declaration of rights would be essential.[48] Some two months later the report of the select committee was taken up in the committee of the whole. The due process section had been reported as first suggested by Mr. Madison, with only a few verbal alterations.[49] Suggestions were made that the portions of the

than one punishment or one trial for the same offence; nor shall he be compelled to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use without a just compensation." Annals of Congress (Wash., 1851), Vol. I, p. 434.

47 "If they [these articles] are incorporated into the Constitution independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." Annals of Congress, Vol. I, p. 439.

48 Annals of Congress, Vol. I, p. 440. When the proposal to consider amendments was first brought up, Mr. Jackson opposed it on the ground that a Bill of Rights was useless and Congress was too busy to consider one. The house moved to consider the proposed amendments in a committee of the whole. *Ibid.*, Vol. I, pp. 440-450. On July 21st, Mr. Madison proposed that the house resolve itself into a committee of the whole to consider the amendments. However, by a vote of thirty-four to fifteen, a motion was carried to discharge the committee of the whole from this duty and on motion from Mr. Madison the matter was referred to a select committee of one from each state as follows: Messrs. Vining, Madison, Baldwin, Sherman, Burke, Gilman, Clymer, Benson, Goodhue, Boudinot, and Gale. *Ibid.*, Vol. I, pp. 660-665.

49 The report of the select committee was laid on the table July 28th, and was not again considered until Aug. 13. Even then it was urged that the Judiciary Bill was much more important. Annals of Congress, Vol. I, pp. 702-708. The committee reported the following article: "No person shall be subject, in cases of impeachment, to more than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty, or property without due

clause which dealt with self-incrimination and prohibition of more than one trial for the same offense were ambiguous, and an amendment was offered limiting these portions of the article to criminal cases. Aside from this, however, and with no alteration of the due process clause as proposed, the amendment was unanimously passed by the committee of the whole.[50] The house then adopted, without debate, this amendment as proposed by the committee of the whole,[51] and a committee was appointed to arrange the amendments in a suitable order, after which they went to the Senate.[52]

The debates of the Senate of this period have never been fully recorded and the sketches which we have of them are far from satisfactory.[53] The journal of that body shows only that the proposed amendments were discussed early in September and that no amendments concerning the due process provision were offered.[54] After the deliberations of a joint committee of the two houses, the amendments were passed by both and the twelve proposals were ordered transmitted to the states.[55] The Fifth Amendment as thus proposed[56] must be considered in all important particulars as the work of Madison, and for this reason his words in the House declaring that it was expected to limit not only the executive but also the legislature are especially significant.

process of law; nor shall private property be taken for public use without just compensation." *Ibid.*, Vol. I, p. 753.

[50] August 17, 1789. Annals of Congress, Vol. I, p. 753.

[51] August 20, 1789. *Ibid.*, p. 767.

[52] August 24, 1789. *Ibid.*, p. 779.

[53] Maclay does not mention any discussion of the due process section, or indeed any of the amendments. William Maclay, Sketches of Debates in the First Senate of the United States (Harrisburg, 1880).

[54] They were discussed Sept. 2, 4, 7, and 9. Annals of Congress, Vol. I, pp. 74-77.

[55] Annals of Congress, Vol. I, pp. 87, 88.

[56] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land and naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation."

§ 61. The leading newspapers of the time published the preliminary proposals of Madison, the report of the select committee, the debates on the proposals in the house and the amendments as finally passed by the first Congress.[57] As soon as Madison's proposals were published, they formed the basis for discussion, and a number of leaders in various states wrote to him suggesting changes and additions.[58] Jefferson had been especially insistent on the incorporation of a Bill of Rights in the constitution[59] and seems to have been induced to support the new government only after the virtual promise of Madison and others that it would be included.[60] He was not entirely satisfied

[57] Gazette of the United States (N. Y.), June 13, Aug. 1, 29, Sept. 23, Oct. 3, 1789, Vol. I, pp. 71, 125, 126, 158, 185, 199; Pennsylvania Packet and Daily Advertiser (Phila.), June 12, Oct. 6, 1789; Pennsylvania Gazette (Phila.), June 17, Aug. 12, 26, Sept. 9, Oct. 7, 1789; Connecticut Gazette (New London), June 26, Aug. 14, Sept. 4, 1789; Massachusetts Spy: or the Worcester Gazette, June 25, Aug. 6, 13, Sept. 3, Oct. 8, 1789.

[58] Some gave unqualified approval to the proposals of Madison, Trench Coxe, Letter to Madison from Philadelphia, June 18, 1789. Documentary History of the Constitution, Vol. V, pp. 178, 179. Some desired other amendments to be added. William R. Davie, Letter to Madison from Halifax, N. Car., June 10, 1789. Ibid., Vol. V, pp. 176, 177. J. Dawson, Letter to Madison from "Frdksburg, June 28, 1789," *Ibid.*, Vol. V, pp. 179, 180.

[59] "The enlightened part of Europe have given us the greatest credit for inventing the instrument [a Declaration of Rights] of security for the rights of the people and have been not a little surprised to see us so soon give it up." Jefferson, Writings (Wash. edition), Vol. II, p. 586. Bourne draws the conclusion that the lack of a Bill of Rights surprised the French, but the quotation seems to be rather a reflection of Jefferson's personal views on French opinion. Henry E. Bourne, "American Precedents in the National Assembly," American Historical Review, Vol. VIII (Apr., 1903), pp. 466-486.

[60] "There are public letters just arrived from Jefferson. The contents are not yet known. His private letters to me and others refer to his public for political news. *I find that he is becoming more and more a friend of the new constitution, his objections being gradually dispelled by his own further reflections on the subject.* . . . The defects of the Constitution which he continues to criticise are, the omission of a Bill of Rights, and of the principle of rotation, at least in the Executive department." James Madison, Letter to Edmund Randolph, N. Y., July 2, 1788. James Madison, Papers, Vol. II, p. 671. (Italics are in the original.)

"What I disapproved from the first moment also was the want of a bill of rights to guard liberty against the legislative as well as executive branches of the government, that is to say to secure freedom in religion, freedom of the press, freedom from monopolies, freedom from unlawful imprisonment, freedom from a permanent military, and a trial by jury in all cases determinable by the laws of the land." Jefferson, Letter to F. Hopkinson, Paris, March 13, 1789; Documentary History of the Constitution, Vol.

with the proposals of Madison, but suggested no changes in the due process article.[61] To Jefferson, as to the other critics, Madison answered that he had purposely avoided placing anything of a controverted nature in the Bill of Rights because he feared that if the proposed amendments contained any such material they would all be defeated.[62] Indeed so many were the amendments proposed by advocates of Declarations of Rights that the matter became one of the newspaper jokes of the time.[63]

No official records were kept of the debates in the state legislatures, and for this reason we have no way of knowing what official reception the amendments received in the states.[64] Considerable opposition was encountered in the Virginia Senate which rejected four of the proposed amendments, although the one later incorporated in the Constitution as the fifth was accepted.[65] By June, 1790,

V, pp. 159-161. See also Jefferson, Letter to Col. Humphreys, Paris, March 18, 1789, *Ibid.*, Vol. V, pp. 164-166; Letter to Mr. Dumas, Paris, Feb. 12, 1788; Jefferson, Writings (Wash. edition), Vol. II, p. 358.

[61] Jefferson, Letter to Madison, Paris, Aug. 28, 1789, declared he approved the proposal of Madison "as far as it goes; but I should have been for going further." Jefferson, Writings (Washington edition), Vol. III, pp. 100, 101; Documentary History of the Constitution, Vol. V, pp. 198, 199. See also Jefferson, Letter to Col. George Mason, New York, June 13, 1790. Documentary History of the Constitution, Vol. V, p. 242; Letter to Noah Webster, Philadelphia, Dec. 4, 1790; Jefferson, Writings (Wash. edition), Vol. III, p. 201.

[62] Madison, Letters to Jefferson, New York, June 30, 1789; Madison, Writings (Phila., 1867), Vol. I, p. 485; Letter to Edmund Pendelton, N. Y., July 21, 1789, *Ibid.*, Vol. I, p. 479; Letter to Edmund Randolph, Aug. 21, 1789, William Rives, History of The Life and Times of Madison (Boston, 1868), Vol. III, p. 44.

[63] "Seventeen amendments, multiplied by fifty-nine (the number of members in a certain assembly) give a product of one thousand and three—If constitutions can be made perfect by amendments, what a blessed chance has the constitution of the United States!" Gazette of the United States (N. Y.), Aug. 19, 1789 (Vol. I, p. 147).

[64] The messages of the governors submitting the amendments to the state legislatures seem to have been rather perfunctory. See for example the Message of Governor Clinton, C. Z. Lincoln, Messages from the Governors (N. Y.) (Albany, 1909), Vol. II, p. 304.

[65] Madison, Letter to George Washington, Orange, Dec. 5, 1789; Madison, Writings (Phila., 1867), Vol. I, p. 497; Ed. Carrington, Letter to James Madison, Richmond, Dec. 20, 1789, Documentary History of the Constitution, Vol. V, pp. 227-230; Ed. Randolph, Letter to George Washington, *Ibid.*, Vol. V, p. 225; Madison, Letter to George Washington, Georgetown, Jan. 4, 1790, *Ibid.*, Vol. V, pp. 230, 231; Madison, Writings (Phila., 1867), Vol. I, pp. 500, 501.

nine states had ratified ten of the twelve amendments submitted, including the due process provision,[66] and Vermont and Virginia ratified them shortly afterward. Four states took no action.[67] Virginia returned to Congress a proposal that in addition a complete Bill of Rights should be annexed to the fundamental law. Twenty articles were proposed for this formal statement, one of which was a copy of the thirty-ninth article of the Great Charter.[68]

§ 62. It is clear that the Fifth Amendment, as finally written into the fundamental law, had practically no opposition; certainly there was none to the due process provision. Congress, state legislatures, and people took its meaning for granted and considered that its value was not open to question. It has been shown that the demand for a Bill of Rights was chiefly for a few specific provisions, such as a guarantee of the freedom of the press, and a general provision which should limit in a general way governmental power, legislative and executive. There is no doubt that the Fifth Amendment was expected to limit arbitrary abuses of the powers of government from whatever source abuse might come, and it is a perfectly tenable hypothesis that the due process provision was intended to serve as a general limitation to check tyranny in any kind of case in which it should arise. The only other articles

[66] Ratification was completed December 15, 1791, Documentary History of the Constitution, Vol. II, pp. 386-390. Of the two amendments which failed of ratification, one "concerned the ratio of representation to population in the House, and the other forbade any change in the compensation of senators and representatives to become effective until after an intervening election of representatives. The first was ratified by ten states and the second by six states." J. P. Hall, Cases on Constitutional Law (St. Paul, 1913), p. 1414, n. 7.

[67] Massachusetts, Connecticut, Georgia, and Kentucky.

[68] Article 9. "That no freeman ought to be taken, imprisoned or disseised of his freehold, liberties, privileges, or franchises, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the law of the land." Virginia also proposed twenty other amendments to the body of the constitution in addition to the proposed Bill of Rights. Documentary History of the Constitution, Vol. II, pp. 377-385 at 379. Earlier there had been considerable talk in that state of proposing a new convention to revise the constitution. Madison, Letter to Ed. Randolph, N. Y., Apr. 12, 1789, Documentary History of the Constitution, Vol. V, pp. 170, 171.

of the amendments which could possibly have referred to such a limitation as the people desired were the first, second, ninth, and tenth, inasmuch as these are the only ones that could possibly be construed to limit Congress. It is evident that the first two could not have been expected to serve as a catch-all phrase for popular liberty, because the guarantee of these articles are absolutely clear cut and definite. The field is thus narrowed to Article V and the two articles dealing with reserved rights.[69]

The tenth article refers to the division of state and federal powers and as a result must be considered as not pertinent to the purpose desired. The Ninth Amendment declared that the enumeration of rights should not be construed to disparage others, and does not completely cover the case. In the first place the essence of an adequate constitutional guarantee is either that it shall be capable of a more or less definite legal concept or that it already has been given a reasonably clear cut meaning by the courts. This was obviously impossible in this amendment because of the *ejusdem generis* rule.[70] In the second place, this amendment was obviously adopted to quiet the fears of those, like Hamilton, who had insisted that it was dangerous to enumerate the rights because some might be omitted,[71] and hence can not be considered as a positive protection in any sense of the word. In the fifth article the only possible phrase which has a general import is the due process provision, for there is none other that could cover

[69] Article IX. "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

Article X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[70] The courts have had very little occasion to construe this article. G. G. Payne, The Constitution of the United States of America as Amended to Jan. 1, 1923 (Annotated) (Wash., 1923), p. 604. In so far as they have mentioned it, they seem to consider it but a duplicate of the Tenth Amendment. Livingston v. Moore, 7 Pet. (U. S., 1833) 550, 551, 8 L. ed. 781.

[71] See Story On the Constitution (5th ed.), sec. 1905. Quoted in C. K. Burdick, The Law of the American Constitution (N. Y., 1922), p. 437; T. M. Cooley, General Principles of Constitutional Law (3rd ed., Boston, 1898), p. 36.

cases of excessive taxation and arbitrary abuse of the police power. This view that due process of law was considered as a general phrase designed to prevent general arbitrary action on the part of the government is strengthened when we consider that even though it had been frequently used in the colonies and in England, no settled meaning was yet attached to it. Not every statesman, and certainly not all the people, understood the broad character of this protection (it would have evoked considerably more discussion if they had understood it); but it is reasonable to suppose that some of those who were law-trained and understood the nature of the common law had a glimpse at least of the importance of such a basis for future judicial adjudication.

§ 63. It can hardly be doubted that one of the most important parts of the Fourteenth Amendment in the minds of its framers was the last clause of the first section: "nor deny to any person within its jurisdiction the equal protection of the laws."[72]

Since the Dred Scott Decision,[73] there had been no small amount of demand in the North that the freed negroes be given equal civil rights with the other citizens.[74] After the triumph of northern arms this demand took definite shape in the Civil Rights Bill, one of the principal provi-

[72] This and the three following sections are based largely upon the two very excellent studies of the adoption of the Fourteenth Amendment which are available. H. E. Flack, Adoption of the Fourteenth Amendment (Baltimore, 1908) gives a careful analysis of the adoption of the amendment as a whole, tracing it through all of its stages in Congress and in the state legislatures until it was finally ratified. The recent publication of the Journal of the Joint Committee on Reconstruction under the title: R. B. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction (N. Y., 1914), Columbia University Studies, Vol. LXII, made possible the further investigation of this important phase of American constitutional history. The need for a tracing of the due process provision specially with the aid of the journal of the committee which framed it has been met in a most excellent way by H. T. Leyland, The Concept of Due Process of Law in 1866 and its Influence on the Fourteenth Amendment (Thesis for the Degree of Master of Arts [Unpublished] University of Wisconsin, 1922).

[73] Dred Scott v. Sandford, 19 How. (U. S., 1856) 393, 15 L. ed. 691.

[74] W. D. Guthrie, Lectures on the Fourteenth Article of Amendment to the Constitution of the United States (Boston, 1898), pp. 18, 19.

sions of which was to give the newly freed men equal rights and privileges.[75] Some of the best lawyers in Congress at the time feared this measure would be unconstitutional,[76] and indeed it was vetoed by President Johnson partly on this ground.[77] Although the bill was safely passed over the veto,[78] the fear that the courts would hold it void persisted, and with no small amount of justification. These fears constitute one of the principal reasons why the proposal to amend the Constitution was pushed through.[79] When the first proposals for a new amendment were being made, the equal protection of the law for the colored folk was invariably included.[80] Three months before there was any mention of due process of law in the joint reconstruction committee it was proposed to give Congress power to secure equality of life, liberty, and property rights throughout the country.[81] Throughout the debates on the floor of Congress the equal protection portion of the amendment was considered by far the most important provision,[82] and there is some reason for thinking that at least some of the Congressmen looked upon "due process of law" as merely an additional guarantee against the denial of equal protection of the laws.[83]

[75] Flack, Adoption of the Fourteenth Amendment, pp. 26-29.

[76] John A. Bingham was one of the most prominent of these. Flack, Adoption of the Fourteenth Amendment, p. 30.

[77] March 27, 1866. Flack, Adoption of the Fourteenth Amendment, p. 35.

[78] It passed the last house (House of Representatives) April 9, 1866. Flack, Adoption of the Fourteenth Amendment, pp. 39, 40.

[79] Flack, Adoption of the Fourteenth Amendment, pp. 94-97.

[80] Leyland, Concept of Due Process, p. 85; Guthrie, Fourteenth Amendment, pp. 23-27.

[81] "Due process of law" was first proposed by John A. Bingham, April 21, 1866. Flack, Adoption of the Fourteenth Amendment, p. 65; Leyland, Concept of Due Process, p. 92. At this time a proposal of Mr. Bingham to include the "equal protection of the law" clause alone was defeated. Kendrick, Journal of the Committee on Reconstruction, p. 85.

[82] In the House only Bingham had any conception of the import of the due process provision and even he emphasized the equality clause more than it. Leyland, Concept of Due Process, p. 103. The Senate likewise considered the equal protection of the law as the essential matter. *Ibid.*, p. 113.

[83] For example Senator Howard seemed to have this idea. Flack, Adoption of the Fourteenth Amendment, p. 87.

§ 64. Another prime object of the first section of this amendment was to reenact a Bill of Rights for the states.[84] In part this shows the result of the general movement to secure the supremacy of the federal government, which was to be expected after such a costly and bloody war had been fought on that very question.[85] The state legislatures saw the possibilities in this amendment and declared that either it was useless, being a mere reenactment of the Fifth Amendment or the common law protection,[86] or else it was exceedingly dangerous in that it gave to federal agencies the power to supervise all state legislation.[87] In framing his proposal for the first section of this amendment, Bingham took the wording "due process of law" deliberately from the Fifth Amendment[88] and defended his action by showing that under the decision in Barron v. Baltimore[89] the first eight amendments did not protect the citizens against arbitrary state action,[90] with the result that there had developed considerable diversity in the decisions.[91] In thus reenacting a Bill of Rights for the states, it seems to have been the intention of the framers of the article to make it as broad as possible. There is evidence

84 Flack, Adoption of the Fourteenth Amendment, pp. 94-97.

85 Flack, Adoption of the Fourteenth Amendment, pp. 68, 69.

86 Leyland, Concept of Due Process, p. 122; Flack, Adoption of the Fourteenth Amendment, pp. 178, 196.

87 Leyland, Concept of Due Process, p. 126; Cincinnati Commercial, Oct. 26, 1866, cited in Flack, Adoption of the Fourteenth Amendment, p. 146.

88 Leyland, Conception of Due Process, pp. 91, 92. Bingham claimed that he copied the Fifth Amendment directly but he certainly was no slavish copyist, for he picked certain portions of the Fifth Amendment and left others. He seems to have incorporated what he considered to be the most important elements of that amendment for the purpose in hand; namely, the securing of national supremacy. *Ibid.*, p. 95.

89 7 Pet. (U. S., 1833) 243, 8 L. ed. 672. See also *supra* sec. 8, n. 18.

90 Leyland, Concept of Due Process, pp. 96, 103. A very considerable number of the members of both House and Senate seem to have been ignorant of this decision. *Ibid.*, pp. 103, 108. In general the position on these matters was the same in the Senate as in the House. Flack, Adoption of the Fourteenth Amendment, pp. 93, 94.

91 Cooley had complained of this. T. M. Cooley, Constitutional Limitations (Boston, 1868), p. 431; While Bingham does not discuss this point on the floor of the House, there is little doubt but that he was aware of the chaotic condition of this portion of the law. Leyland, Concept of Due Process, p. 96.

that they considered the first section to contain the sum total of American liberties.[92] Bingham considered that it would be the "Keystone of American Liberty"[93] securing to every citizen, white as well as black, the protections of the federal Bill of Rights.[94] Indeed there is some evidence that due process of law was considered to include not only the right to trial by jury[95] but also protection against illegal use of the power of eminent domain.[96] Roscoe Conkling argued some twenty years later in the San Mateo case[97] that it was framed to protect corporations as well as natural persons, and in view of Blaine's sweeping statement this was probably true.[98] Brannon was probably right when he claimed that it was considered as the "Maxima Carta."[99]

§ 65. The lack of any intelligent discussion of the due process provision in the Fourteenth Amendment is most noteworthy. It was the least discussed of any of the provisions in the amendment. Practically no attention was paid to its meaning, although the other clauses in the same section were carefully scrutinized.[1] Bingham seems to have been the only member of Congress who had occasion to tell what he considered due process of law to mean, and he very probably expressed the general feeling of the House when he declared in answer to a question regarding its meaning, "the courts have settled that long ago, and the gentlemen can go and read their decisions."[2] Ley-

92 *Ibid.*, pp. 103, 106.
93 *Ibid.*, p. 94.
94 *Ibid.*, pp. 93, 96, 97, 103.
95 Flack, Adoption of the Fourteenth Amendment, p. 151.
96 Leyland, Concept of Due Process, p. 109.
97 San Mateo County v. Southern Pac. R. Co., 116 U. S. (1886) 138, 29 L. ed. 589.
98 J. J. Blaine, Twenty Years of Congress, Vol. II, p. 419.
99 Henry Brannon, Treatise on the Rights and Privileges Guaranteed by the Fourteenth Amendment (Cincinnati, 1901), p. 10.

1 Leyland, Concept of Due Process, p. 113. Bingham declared that there was no opposition to the due process provision for every one agreed that these rights should be protected. Kendrick, Journal of the Reconstruction Committee, p. 217.

2 The Congressional Globe, 39th Congress, 1st Sess., quoted in Leyland, Concept of Due Process, p. 102.

land accounts for this silence of the members of Congress on this important point by assuming that each congressman had the viewpoint of the courts of his own state and so thought that they knew what the phrase meant.[3] The better interpretation, however, seems to be, in view of the material presented by both Leyland and Flack, that the members of Congress, with the exception of a very few first-rate constitutional lawyers in that body, really had no definite conception of what the phrase meant.[4] Furthermore, it seems reasonable under the circumstances that the Thirty-ninth Congress, even as the First Congress before it, realized that they did not know just what due process meant; it being a technical matter of legal interpretation, they preferred to leave it to the decisions of the courts. In this way the members of Congress, knowing that there was a body of technical rules built up around the idea of "due process of law" and considering it to be a most valuable protection of the general rights of the people, decided to incorporate it into the fundamental law as a limitation on the power of the states and leave its ultimate definition and application to the future adjudication of the courts. It is true that many of the members of Congress acted as if they were familiar with the scope and nature of due process, and they doubtless had a rather hazy idea of the general nature of the protection.[5] But the rather fruitless discussion of the meaning of property reveals, if anything, a striking lack of knowledge on legal subjects.[6] Bingham certainly was familiar with the body of law which had grown up around this phrase,[7] and some gave evidence of a knowledge of the decisions of courts outside their own

[3] *Ibid.*, p. 114.

[4] Kendrick comments upon the lack of ability of the Democratic members of the Committee on Reconstruction. Journal of the Reconstruction Committee, p. 195. Roscoe Conkling of New York seems to have been the only member of the Committee who came from a state in which the courts had attempted to apply due process in any considerable number of cases. *Ibid.*, pp. 155-195.

[5] Leyland, Concept of Due Process, p. 115.

[6] *Ibid.*, p. 106.

[7] *Ibid.*, pp. 96, 103.

states.[8] But the members so equipped were certainly in the minority. Probably most of the members did not even know the federal decisions on this subject, few as they had been.[9] What has been said of the opinion of the members of Congress applied to even a greater extent to the members of the state legislatures. The records of discussions of this phrase in the states show it to have been considered less than most of the other parts of the section, and they reveal, a greater lack, if possible, of professional legal knowledge than Congress had displayed.[10]

§ 66. Finally, there seems to have been a subconscious attempt on the part of the framers and ratifiers of the Fourteenth Amendment to make it as vague as possible. It has been pointed out that it is possible to interpret the Fifth Amendment as the general catch-all phrase of rights in the federal Bill of Rights.[11] In any event the courts lost sight of that possibility and it was not until they had rather unsuccessfully attempted to make an elastic clause from the "obligation of contracts" clause and the prohibition of *ex post facto* laws that we find any attempt to give elasticity to "due process of law."[12] There are other clauses which might have served as a rubber band to bind together the general body of human rights. There is some evidence that Hamilton considered the preamble as being of that nature,[13] and Sumner had called the provision that the federal government shall guarantee to the states a republican form of government the "sleeping giant of the Constitution."[14] The courts, however, never looked with favor on these clauses, probably because as soon as the real need for judicial control over state legislation developed the due process provision was present. There

[8] *Ibid.*, p. 110.
[9] *Ibid.*, p. 103.
[10] *Ibid.*, p. 118.
[11] See sec. 62.
[12] Guthrie, Fourteenth Amendment, pp. 4, 5.
[13] Federalist, No. 84.
[14] Roger Foster, Commentaries On the Constitution (Boston, 1895), Vol. I, p. 209.

is, therefore, some evidence that the Radicals in the Reconstruction Congress deliberately incorporated this more or less vague phrase in order that, as they hoped, it might prove to be a wakeable sleeping giant. The only way it would have been possible to have induced the states to approve such a sweeping curtailment of their powers was by adopting a clause which conveyed no settled meaning.[15] This view is confirmed by the effort of some of the governors to gloss over "due process of law" by merely referring to it as a regular "legal process."[16] This very vagueness of the phrase, however, caused difficulty in some of the states.[17] The objection turned on the fear that this provision might give affirmative power to Congress,[18] and even the right to decide what was due process of law,[19] rather than an apprehension as to its meaning or inherent possibilities.[20] Even the framers of the section, the radicals who incorporated the vague phrase in it, failed to see its tremendous possibilities. These were to develop only when the industrial revolution had thrown upon the legislatures the necessity of dealing with new problems for which they were inherently unsuited.

15 Flack, Adoption of the Fourteenth Amendment, pp. 68, 69.
16 Leyland, Concept of Due Process, p. 121.
17 *Ibid.*, pp. 118, 119; Flack, Adoption of the Fourteenth Amendment, p. 166.
18 Flack, Adoption of the Fourteenth Amendment, pp. 94-97, 159, 160, 207-209.
19 Leyland, Concept of Due Process, pp. 119, 120.
20 *Ibid.*, Concept of Due Process, p. 125.

CHAPTER X.

STATE CONSTITUTIONAL CONVENTIONS.

§ 67. The sources for the study of opinion in the state constitutional conventions are of two principal kinds. Nearly every convention kept a journal or similar document in which was recorded all official acts, such as motions, votes, amendments, etc.[1] As evidences of opinion on due process these journals are very poor sources, and some of the very conventions which are most important and from which one might expect to learn most, including seven of the first post-revolutionary bodies,[2] failed to provide for the publication of their journals. Beginning about the third decade of the nineteenth century, the conventions began to keep records of the debates, which are, as a rule, much better sources.[3] But again in the case of these records the very period, which for the purposes of this study is most important, is the one most poorly covered. Furthermore, many of the early journals and debates have been lost or destroyed.

The work of some of the conventions may be disposed of with little comment. In some cases the whole question of a Bill of Rights and its contents was left to a committee which failed to incorporate a due process clause in its report.[4] In other cases the due process provision was

[1] These are called by various names. The majority of the conventions called them "Journals." Some called them "Proceedings" (as in the cases of Del., 1776; Maine, 1816; Md., 1776; Va., 1776); while others call them "Minutes" (as in the cases of Del., 1791; Pa., 1789).

[2] Georgia, 1776, 1788, 1789, 1798; Ky., 1792; La., 1812; Mass., 1778; N. H., 1778, 1781; R. I., 1824, 1834, 1841; S. Car., 1790; Vt. 1777.

[3] Among the other records of the conventions might be mentioned "Documents," "Papers," "Manuals," "Reports," etc. For a complete list of these see A. H. Shearer, List of Documentary Material Relating to State Constitutional Conventions, 1776-1912 (Chicago, 1912).

[4] Journal of the Proceedings, N. J., 1844; Debates and Proceedings, Ohio, 1850.

adopted without amendment or discussion just as reported by the committee on the Bill of Rights.[5] This happened so frequently that one is forced to the conclusion that the conventions considered both the wording and the meaning of the phrase as having been established by tradition, and consequently did not desire to tamper with either. In still other cases amendments were offered to the due process section, but were of such a nature that the meaning was not materially affected;[6] such as, for example, combining it with a clause giving protection from illegal criminal procedure.[7] Frequently verbal changes were made in the committee of the whole, or indeed after passing that stage; but again they were largely of a nature not to affect the essential meaning of the protection. They only concerned such questions as whether "subject" was preferable to "person,"[8] "to" to "shall be";[9] if "lawful" should be inserted before "judgment of his peers," etc.[10]

§ 68. Very few cases throw any light upon the object of the conventions in inserting such a phrase into the fundamental law. The earliest of these was in the first convention in New York, 1777, where the report of the committee was so worded as to make it clear that the legislature might disfranchise a person of his rights by the mere passage of a statute. This report was amended in the convention so that the clause read like that of Magna Carta.[11]

[5] Journal, Ala., 1819; Journal of Proceedings and Debates, Miss., 1865; H. Fowler; Debates and Proceedings, Ind., 1850; Journal, N. Car., 1868; Proceedings, S. Car., 1868; Journal, Ga., 1865; Journal, Ga., 1867, 1868; Journal, Va., 1850; Debates and Proceedings, Va., 1867; Debates and Proceedings, Mass., 1853; Journal, Mich., 1850; Journal, Ill., 1862; Debates and Proceedings, N. Y., 1788.

[6] Debates, Ky., 1849; Conventions and Constitutions of Pennsylvania, 1776, 1790; Proceedings and Debates, N. Y., 1821; Perley, Debates, Maine, 1820; Journal, Maine, 1820; Journal, Mo., 1845; Debates and Proceedings, Nev., 1864.

[7] Journal, Mass., 1779; p. 38, 195; Debates and Proceedings, Minn., 1857.

[8] Journal, Mass., 1820, pp. 101, 131, 160, 250.

[9] Debates and Proceedings, Mich., 1867, Vol. I, p. 610, Vol. II, pp. 383, 762; Journal, Mich., 1867.

[10] Proceedings, Md., 1776, pp. 296-313.

[11] The committee report prohibited the disfranchisement of persons "unless by act of the legislature of this State." Livingston offered a substitute

It thus appears that the "law of the land" as incorporated in that constitution was intended to mean something more than a legislative enactment; but it may well be doubted if the members of the convention analyzed the matter so closely. In general the members of the conventions were notoriously poorly informed and non-critical in regard to the provisions of the Bill of Rights. As late as 1838 we find a considerable number of delegates in the Pennsylvania convention asserting that the "law of the land" secured to the accused the right of trial by jury.[12] The hazy ambiguity which surrounded the meaning of this phrase in revolutionary times was, indeed, very slowly lost.

This obscurity of meaning so impressed the committee on "Rights and Privileges of Citizens" of the New York convention of 1846 that they proposed sweeping changes to render the provision more specific. In the first place, it was proposed that the phrase "judgment of his peers" be dropped because it only made "confusion and a distinction with due process of law."[13] The remaining clause was then reported with an elaborate addition dealing with deprivation of vested rights, special legislation, and similar dangers.[14] A hot debate ensued, the arguments being largely confined to a discussion of which was preferable, specific statements or general protections. Those favoring the former were quite persistent and, even when the rec-

article which was adopted: "No member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to the subjects of this State by this Constitution, unless by law of the land, or the judgment of his peers." C. Z. Lincoln, Constitutional History of New York (Rochester, 1906), Vol. I, p. 522.

[12] Three speeches of considerable proportions were made in favor of this viewpoint, one by each of the following: Agnew, Purviance, Dickey. Proceedings and Debates, Pennsylvania, 1837-1839, Vol. XII, pp. 28-42.

[13] Debates and Proceedings, N. Y., 1846, (reported by Coswell and Sutton, Albany, 1846), p. 418.

[14] "Section 3. No citizen or member of this state shall be disfranchised or deprived of any rights, privileges, or franchises by anything contained in this constitution, nor shall any vested rights or remedies be divested, destroyed, or taken away in any manner whatsoever, except upon the verdict of a jury, rendered according to due course of law in a civil action or in a public prosecution and in pursuance of some general law of the land promulgated prior to the act or matter alleged as the cause of such action or prosecution." Debates and Proceedings, N. Y. 1846, p. 421.

ommendations had been beaten, another amendment of similar purport was offered only to be promptly rejected.[15] Those who opposed the amendment pointed out that some of the protection of the original "law of the land" might be lost if the convention made it more specific by adding details which were complicated and little understood.[16] The committee of revision then took up the whole matter and decided to reinsert the provision as it had occurred in Magna Carta.[17] It was indeed the very vagueness of the due process provision which commended it, for because of that it could serve as a general protection securing the rights of the people from all kinds of arbitrary action on the part of the government. Even before this debate the New York courts had showed quite clearly that they considered due process of law to be a protection of this nature.[18]

§ 69. On the other edge of the continent, however, there was even a more spirited and in some respects more pointed discussion of the meaning of this phrase. The gold rush had brought to California an adventurous and varied population. As a consequence the convention of 1849 represented in many respects a composite of the

15 "Unless upon the verdict of a jury rendered according to the course and usage of the law, in a civil action or in a public prosecution, and in pursuance of some general law promulgated prior to the act or matter alleged as the cause of such action or prosecution." Debates and Proceedings, N. Y., 1846, p. 423.

16 Mr. Nicholas preferred the original section as "more simple, and concise and equally comprehensive, except that the amendment precludes the passage of *ex post facto* laws." These should be prohibited by a separate section. Debates and Proceedings, N. Y., 1846, p. 421. Mr. Loomis and Mr. Chatfield objected that the amendment confirmed vested rights in a dangerous manner as well as being needlessly complicated and entirely useless. Mr. Harris objected to the vagueness and indefiniteness of the amendment as contrasted with the original which he contended was well understood. Mr. Kirtland feared that the amendment might be construed as giving the legislature power to impair vested rights if the law was not *ex post facto*. Mr. Campbell wished to let well enough alone. *Ibid.*, p. 422.

17 Debates and Proceedings, N. Y., 1846, pp. 806-811; Documents of the Convention, N. Y., 1846, No. 39, pp. 1, 3.

18 Matter of Albany Street, 11 Wend. (N. Y., 1834) 149, 25 Am. Dec. 618; Matter of John & Cherry Streets, 19 Wend. (N. Y., 1839) 659; Cochran v. Van Surlay, 20 Wend. (N. Y., 1828) 365, 32 Am. Dec. 570; Taylor v. Porter, 4 Hill (N. Y., 1843) 140, 40 Am. Dec. 274.

viewpoint of the nation. It was here that the strong vested rights conceptions of due process from New York first came into conflict with the looser ideas entertained, especially in the South.[19] The argument arose over the detailed point of which was preferable, "citizen," "inhabitant," or "member,"[20] but was soon carried into a discussion of whether the word "disfranchise" would prevent the placing of restrictions upon suffrage.[21] In this way the real purpose of putting such a clause into the instrument became the subject of discussion. Some failed to see that an act of the legislature would not be due process, and hence considered the section as superfluous.[22] The New York contingent, however, strongly insisted that this clause was a valuable protection (against what it was to protect does not appear),[23] inasmuch as it had so proved in New York.[24] Their arguments did not prevail, and the committee of the whole ordered the clause stricken out.

[19] Three of the most vigorous opponents of the clause were from Louisiana where there had been no such protection. Others were from Missouri, New Jersey and Virginia.

[20] The committee on the Constitution had copied the section from the New York Constitution. Mr. Botts moved to strike out the word "member" and insert "citizen" in order, as he said, to make this superfluous section as harmless as possible! Mr. Halleck proposed "inhabitant" and the debate arose over the question of including the Indians in the scope of this provision. J. R. Browne, Debates, Cal., 1849 (Wash., 1850), pp. 34, 35.

[21] Mr. Botts and Mr. Dent argued that it applied to the suffrage as well as any other franchise. Mr. Hastings claimed that it applied chiefly to suffrage but Mr. Ord declared that it had nothing to do with the right to vote. Browne, Debates, Cal., 1849, p. 35.

[22] Mr. Botts declared: "It may be well enough to declare that we shall not deprive the inhabitants of this State of their franchise or freedom, except by the law of the land; but there does not appear to be any necessity for making such a declaration, inasmuch as they can not be deprived of such rights in any other way." Browne, Debates, Cal., 1849, pp. 35, 36. Cf. the argument of Mr. Jones, *Ibid.*, pp. 37, 38.

[23] Mr. Shannon said: "This does not refer to the single right of voting or the elective franchise. It includes all the rights and privileges secured to citizens. There can be no understanding here as to the previous existence of those rights. It is for the very purpose of creating a fundamental law of the land to determine them, that this Convention is now assembled." Browne, Debates, Cal., 1849, p. 37. Cf. the argument of Mr. Norton, *Ibid.*, pp. 36, 37.

[24] Mr. Norton declared with some little pride that this section was taken *verbatim* from the New York Constitution. Browne, Debates, Cal., 1849, p. 36.

Their report was concurred in by the House.[25] It is interesting to note, however, that a due process clause in connection with the criminal procedure article was subsequently adopted without debate.[26]

It would seem that this incident was a defeat for that portion of the convention which favored the general protection which a due process clause would give. This, however, was not the case. In the first place, the report of the committee of the whole was ratified on this point by a reduced majority, some of the most ardent opponents having been converted to the provision.[27] Then the character of the men who composed this convention was perhaps without precedent inasmuch as they were largely adventurous, freedom-loving pioneers, who, having failed to make good at home, decided to try a new deal in the West. There is little wonder that men of this type did not enthuse over property protections in the constitution. The final cause for the defeat of the separate clause may best be looked for in the fact that it was strongly supported by men from New York. The natural antagonism of the Californians to New Yorkers and everything from New York was carried even into their constitutional convention. Although there were practically no Iowans in the convention, they based their Bill of Rights quite largely on the Iowa documents of 1844 and 1846. Lastly, the men of the convention did want to deprive persons of certain rights without due process of law. They feared that if the New York provision were adopted it would enfranchise the Indians.[28]

[25] *Ibid.*, pp. 38, 288, 289.
[26] *Ibid.*, pp. 31, 41, 293, 294.
[27] E. g., Mr. Botts.
[28] Mr. Semple argued: "Suppose we pass this provision in the Bill of Rights, will it not cramp our action hereafter? Other sections must come up defining who are entitled to certain rights. Here you declare that no citizen should be deprived of any of his rights or privileges unless by due process of law. Particular classes must necessarily be deprived of the right of suffrage. You proceed in another section to deprive them of that right. This is not due process of law. If such a provision is necessary at all it cannot properly be introduced in this part of the Constitution." Browne, Debates, Cal., 1849, pp. 36, 37.

§ 70. In the same year members of the Illinois convention attempted to make this provision in their constitution more specific. An elaborate amendment was offered which contained most of the substantial protections afforded by the due process clause, and which was intended to restrict the legislature along definite lines.[29] Its clumsiness, together with the fear that something desirable might be omitted, and something undesirable included, caused its defeat.[30] This was another victory for those who desired a general inclusive limitation rather than a number of particular restrictions.

The Maryland convention of 1851 was the scene of the next controversy regarding "due process of law." An attempt was made to change the word "freemen" to "citizen," but at once the objection arose that the latter would include the free negroes of the state and thus be a serious limitation upon the power of the legislature to deal with them in a summary manner if they should ever get too numerous. Some of the members of the convention had the idea that a legislative enactment was due process of law, but it is evident that they were in the minority.[31] Ex-

[29] "Sec. 36. The General Assembly shall have no power to pass any law whereby any person shall be deprived of life, liberty, property, or franchises, without trial, judgment, or decree in some usual and regular judicial tribunal; Provided, that revenue, taxes, and assessments may be collected, and private property may be taken and applied to public use, and persons and property shall be subject to arrest and seizure, for purposes of trial, judgment or decree, and persons may be punished for contempts by such tribunals, and in such manner as the general assembly, by general and uniform laws, may provide; and Provided further, that franchises of land sold without judgment for taxes asserting title by virtue of such purchase as against the title of the original owner, or person claiming title or possession under such owner, shall be required to prove, in order to sustain the title asserted as aforesaid, that the land was subject to taxation when assessed, and that the same was assessed and sold conformably to law." Journal, Ill., 1847, p. 312.

[30] Journal, Ill., 1847, p. 312. A. C. Cole, Constitutional Debates of 1847 (Springfield, 1919), pp. 732, 733. Another attempt to secure a similar object was made later in the Convention. *Ibid.*, pp. 868, 869; Journal, Ill., 1847, pp. 463, 464.

[31] Mr. Brent made the motion to substitute "citizen" for "freemen" and Mr. Gwinn objected that the protection should not be extended to the negro for it was necessary that the legislature have the right to exile them. Mr. Brent then declared that "law of the land" really meant legislative enactment and so this change would really give the legislature more power. Mr.

pressly to prevent the legislature's hands being tied in this matter, an amendment to the section was passed giving them power to dispose of the colored population as they saw fit.[32] But in 1864 the pendulum had swung back again in favor of the negro rights, and this clause was dropped for the express reason that the black man should be entitled to the same protection as the white.[33] Here again an attempt to make the due process provision more specific by exempting from its operation certain forms of class legislation failed to strike root permanently in the fundamental law.

§ 71. By the time of the Massachusetts convention of 1853 the "due process" clause was coming into vogue as distinguished from the older "law of the land" form. Thus there occurred in at least two states a discussion of the relative merit of these two wordings. In Massachusetts the discussion was merely whether the newer form would as adequately protect the fundamental rights of citizens as the older.[34] That the words were thought to have a legal, and even a common-law meaning at this time is evident.[35] In Iowa it seems that it was expected that this

Dorsey strenuously objected to this for he declared if the legislature can make the law of the land the people have no protection. Debates, Md., 1851, Vol. I, pp. 194-198.

[32] "Provided that nothing in this article shall be so construed, as to prevent the legislature from passing all such laws for the government, regulation, and disposition of the free colored population in this state as they may see fit." Mr. Blackstone opposed this amendment for he said it would take away the last vestige of the rights of the free negroes. Debates, Md., 1851, Vol. I, pp. 197, 259.

[33] Debates, Md., 1864, Vol. I, pp. 235-239.

[34] The following resolution was passed: "That the Committee on the Bill of Rights be instructed to inquire into the justice of incorporating into that instrument provisions which shall effectually secure to all persons on Massachusetts soil their inherent and inalienable rights to liberty, in all cases whatsoever, except as a punishment for crime, and that they shall not be deprived of that liberty without trial by jury and the application of all the forms and safeguards included in which is called 'due process of law,' and report thereon." Journal, Mass., 1853, p. 38; Debates and Proceedings, Mass., 1853, Vol. I, p. 122.

[35] In the New York convention of 1867 Mr. Verplank desired the following provision which failed to be adopted with but little discussion. "No person shall be arrested without due process of law, except as authorized by the common law." Proceedings and Debates, N. Y., 1867, Vol. V, p. 3240.

phrase would act as a prohibition upon slavery as well as upon arbitrary governmental action.[36] The deplorable lack of information in these bodies on matters of the Bill of Rights is shown also in the fact that, even as late as 1857, the idea persisted that the Fifth Amendment and its protections did apply to the state legislatures.[37]

In the constitutional conventions held since the Civil War the due process provision of the Bill of Rights occasioned practically no discussion. It already applied to the states through the Fourteenth Amendment and consequently it made very little difference whether the states adopted it or not. In the Massachusetts convention of 1917, however, the matter came up because it was claimed that the Massachusetts courts were not as liberal in interpreting its meaning as the federal courts. Hence matters were often decided finally without an appeal to the federal courts because no federal question was involved. It was proposed to broaden the article to permit indictment by information rather than by grand jury. The discussion which followed showed that both sides looked upon due process as securing a procedure in accordance with the ancient modes of trial and the difference of opinion merely developed regarding the amount of protection which should be given to the accused. The proposal was defeated largely because it was deemed unnecessary.[38] In

[36] Mr. Ellis in the Iowa convention of 1867 declared that since this provision was in the federal constitution, the states should adopt it for he wanted the Iowa constitution fully as strong as the former. "If the words 'due process of law' shall in time be recognized by our judicial tribunals to mean what they really do mean, that no person shall be deprived of life, liberty, or property without a legal proceeding based upon the principles of the common law, and the constitution of the United States —that every man, when his life or liberty are imperilled, shall have the right to be tried by a jury of his countrymen. Then, sir, that infamous fugitive slave will become a nulity." This convention was held just one year after the decision in Dred Scott v. Sandford, 19 How. (U. S., 1856) 393, 15 L. ed. 691. Debates, Iowa, 1857, Vol. I, pp. 101, 102; Journal, Iowa, 1857.

A similar view was expressed in par. 8 of the Republican Platform of 1860. K. H. Porter, National Party Platforms (N. Y., 1924), p. 57.

[37] It seems that both the advocates and the opponents of this section held this view. Debates, Iowa, 1857, Vol. I, p. 119.

[38] W. A. Burns had proposed to broaden the due process provision by adding that no procedure should be held not due process merely because it

the other recent constitutional conventions attempts were made to amend this section either to make it conformable to the federal decisions or to give greater protection to the rights of labor, but these have been invariably defeated without debate.[39]

§ 72. Three conclusions, then, may be drawn from this chapter. In the first place it is clear that while the conception of due process as especially limiting the legislature extended back as far as the first convention of New York, it gained ground slowly. Even by the middle of the century there was a considerable body of men, many of them lawyers, who did not hold this view of the meaning of the phrase. After the Civil War the matter was generally accepted as settled.

In the second place, it is evident that many considered that due process of law secured a trial by jury. By the middle of the century the procedural side of due process had been firmly fixed, and among the ancient rights which it was supposed to protect was trial by jury. But other elements were recognized. The phrase was considered a valuable limitation on the power of eminent domain, on unjust classification, and to a very small extent, as in Maryland, on the abuse of the police power. These interpretations of the protection, however, were almost never original with the members of the conventions but instead came only after the courts had already worked them out in some detail.

Third; it should be observed that there were several

"was not in force and effect in England or in the Province of Massachusetts Bay" before the adoption of the Constitution of 1790. The Massachusetts court had held in Jones v. Robbins, 8 Gray (Mass., 1857) 329, that an indictment by information was not due process. This was of course contrary to Hurtado v. California, 110 U. S. (1884) 516, 28 L. ed. 232, and it was feared that should the legislature authorize such a method of indictment the Massachusetts Courts would again hold it void. Mr. Sullivan declared that he feared such an amendment would really take away the right of trial by jury. Debates, Mass., 1917, 1918, Vol. I, pp. 369-374.

39 For example see Journal, Nebr., 1919, Vol. I, pp. 164, 552. This problem came up only incidentally in the Illinois convention of 1920-1922. Proceedings, Ill., 1920, Vol. I, p. 319.

attempts to remove this catch-all phrase from among the protections which were placed in the Bill of Rights and to substitute for it a number of definite limited restrictions. These efforts show two things. There was evidently a fear that the scope of due process of law might be indefinitely extended by the courts, and hence there was a desire to make the protection more definite. But on the other hand, these very attempts are evidence that the majority still desired the more general and traditional check upon the legislature. They feared to give it up, for they might lose some of the unexplored rights still buried in the due process provision.

CHAPTER XI.

DUE PROCESS IN LEGAL TREATISES.

§ 73. When we turn from the proceedings of the state constitutional conventions to the treatises on constitutional law, a similar situation confronts us. Some of the writers take the meaning of due process of law for granted or casually remark that it is "so easily understood, as to need no explanation."[1] Most of the authors, however, undertake to give some explanation of the Fifth or Fourteenth Amendment even though they only repeat the traditional platitudes of Coke or Blackstone. It is only occasionally that a legal thinker of the vigor or originality of Cooley or Freund takes the initiative and breaks new ground in the formulation of constitutional doctrines. For the most part they have not even kept pace with the more advanced thinking of the courts even though the latest decisions may be cited. But the very fact that the text authorities keep so close to the beaten path of legal generality is significant. It is another illustration of the method by which due process of law has retained its indefiniteness in the hands of those who have little understood its scope. At the same time this conservatism has undoubtedly restricted the influence of American commentators to a much narrower field than they enjoy on the continent of Europe or even in England.

The practice of writing systematic treatises on the Con-

1 The Fifth and Sixth Amendments contain "provisions for the security and property and life.... founded on the principles of common law and common justice. Some of them have been noticed in the preceding part of this work, and the others are so easily understood as to need no explanation." Among "the others" were included due process of law. A. W. Young, Introduction to the Science of Government (Auburn and Buffalo, 1854, first ed. 1839), p. 190.

stitution did not become widespread until the last half of the nineteenth century. But in spite of the few works of this nature before that time, it is possible to see from other legal discussions, something of the ideas connected with due process of law during this period. It is evident that there were two distinct schools of thought. The first of these took the position that this guarantee was put into the Constitution in order to protect the criminal from arbitrary prosecution and imprisonment.[2] With the exception of Judge Story, the writers who took this view were the poorer authorities and the ones least cited by the courts.[3] Indeed, this may be characterized as the laymen's view of the phrase, and it seems to have penetrated legal circles chiefly as the result of the influence of Story who adopted the loose ideas of uncritical thinkers in this regard.[4] That he misled the legal profession can not be doubted, and until the middle of the century, writers declared that the chief purpose of due process of law was merely to act as an additional safeguard to trial by jury.[5]

[2] "Lord Coke says that these latter words [by the law of the land] mean by due process of law, that is without due presentment or indictment, and being brought in to answer thereto, by due process of the common law. So that this clause in effect affirms the right of trial according to the process and proceedings of the common law." Joseph Story, Commentaries on the Constitution (Boston, 1833), Vol. II, sec. 1789.

[3] Young, Science of Government, p. 190; James Bayard, Exposition of the Constitution (Phila., 1839), p. 151; Furman Sheppard, Constitutional Text Book (Phila., 1858), p. 250; John King, Commentary on the Law and True Construction of the Federal Constitution (Cincinnati, 1871), p. 329.

[4] E. g., Henry Flanders, Exposition of the Constitution (Phila., 1784). sec. 357; William Rawle, View of the Constitution (Phila., 1825), p. 129. The latter declared in describing the parts of the Fifth Amendment: "The plea of a former acquittal is a complete bar to every subsequent prosecution for the same offense. It follows from all the antecedent precautions, that 'no one can be deprived of life, liberty or property without due process of law,' and the repetition of this declaration is only valuable as it exhibits the summary of the whole and the anxiety that it should never be forgotten."

[5] John Reed, Pennsylvania Blackstone (Phila., 1831), Vol. I, p. 116. Lysander Spooner, Essay on the Trial by Jury (Boston, 1851), pp. 25-50, contended that the thirty-ninth section of the Great Charter guaranteed not only a trial of facts by a jury but the decision of the justice of the case by a man's peers as well. J. P. Bishop, Criminal Procedure (Boston, 1858), Vol. I, secs. 757, 758, asserted that due process of law guaranteed the right of a jury trial. In a later edition (4th, 1868), he admitted that

But even among those who so strongly emphasized the procedural aspects of due process, some were not sure the protection should be limited to procedure alone.[6]

§ 74. The second school of authorities looked upon the Fifth Amendment as much broader than a protection against arbitrary judicial proceedings. As early as 1797 John Adams pointed out that it was not enough that the laws be uniform, for they might appear to apply equally to all and yet be unjust.[7] He does not mention any particu-

the provision limited the legislature as well as the judiciary. *Ibid.*, sec. 57. In the edition of 1895 he pointed out that his first contention regarding trial by jury has not been followed by the courts. *Ibid.*, secs. 100a, 890-892. Pomeroy took great care to point out the error of this view. J. N. Pomeroy, Introduction to the Constitutional Law of the United States (N. Y., 1868), pp. 156, 157.

[6] James Bayard naively declared that the Fifth Amendment stated "principles of common sense, and common justice, from which a government, depending upon public opinion, would not readily depart, and yet which it was well to secure by an express declaration." Brief Exposition of the Constitution (2d ed., 1840), p. 151.

"If a man's property should be arbitrarily taken, the fact would alarm his fellow-citizens and they would be prepared to resist. But to arrest a man . . . . is an act which, being hidden, makes less sensation and for that cause becomes more dangerous to public liberty. The constitution has wisely provided that no person shall 'be deprived of his life, liberty, or property without due process of law.'" John Bouvier, Institutes of American Law (Phila., 1851), Vol. I, p. 90. See also Sheppard, Constitutional Text Book, p. 250.

Story broadened his view of the protection very materially in the later editions of his work but his emphasis was still on the procedure required by due process. Story, On the Constitution (4th ed.), pp. 1943-1946, quoted in T. M. Cooley, General Principles of Constitutional Law (Boston, 1898), pp. 243, 244.

[7] "Even equal laws made by common consent, may deprive the minority of the citizens of their rights. A society, by a majority may govern itself, even by equal laws, that is by laws to which all, majority and minority, are equally subject, so as to oppress the minority. It may establish an uniformity in religion; it may restrain trade; it may confine personal liberty of all equally, and against the judgment of many, even the best and wisest, without reasonable motives, use, or benefit. We may go farther, and say that a nation may be unanimous in consenting to a law restraining the natural liberty, property, and commerce, and their moral and religious liberties too, to a degree that may be prejudicial to the nation and every individual in it. . . . A nation may unanimously agree to a navigation act, which should shackle the commerce of all. . . . . These would be all equal laws, made with common consent." The laws should be also "for the general interest or the public good." John Adams, Defense of the Constitutions of Government of the United States of America (3d ed., Phila., 1797), Vol. I, pp. 123, 124.

lar constitutional provision, although his reasoning indicates that he may have had due process of law in mind. In his insight into the problems of legislative classification, Adams was undoubtedly far in advance of his time. Even Chancellor Kent, writing thirty years later, did not catch the full significance of his reasoning; for although he seems to have been the first legal writer to suggest that laws involving an unjust classification are void, he went no further than to condemn class legislation in general terms.[8]

Kent's doctrine secured the support of the courts, which gave it much greater prestige than the view of Story; but even with that support, it made but slow headway. Even among those who followed the New York Chancellor the procedural idea remained the dominant note; the substantive features of the guarantee being distinctly subordinate.[9] By the middle of the century the break with the laymen's view may be clearly seen, but until well after the Civil War, much of the ambiguity of that school remained.[10]

In fact, so eager were many of the writers to utilize the

[8] James Kent, Commentaries on American Law (N. Y., 1826), Vol. II, p. 12. He declared, "It must undoubtedly rest in the wisdom of the legislature to determine when public uses require the assumption of a private property; and if they should take it for a purpose not of a public nature, as if the legislature should take the property of A. and give it to B., the law would be unconstitutional and void."

[9] One of the clearest statements of this period was that of B. L. Oliver, Rights of an American Citizen (Boston, 1832), p. 181. "This clause seems not to be aimed so much at the tyrannical conduct of persons in power, acting under an usurped authority, as to prevent Congress or the legislatures of the states from intrusting a power over the lives or the liberties of citizens to public officers in command, and from confiscating the estates of individuals without the formality of trial by mere unprincipled acts of legislation."

[10] Lysander Spooner, Trial by Jury, pp. 49, 50, explained the sections as follows:

"No freeman shall be arrested or imprisoned, or deprived of his freehold or liberties, or free customs, or be outlawed or exiled, or in any manner destroyed (harmed), nor will we (the king) proceed against him, nor send any one against him, by force of arms, unless according to (that is in execution of) the sentence of his peers, and (or *or* as the case may require) the common law of England (as it was at the time of Magna Charta)." See also R. C. Hurd, writ of Habeas Corpus (Albany, 1858), p. 83; Theodore Sedgwick, Treatise on the Rules which govern the Interpretation and Application of Statutory and Constitutional Law (N. Y., 1857), pp. 610-612.

newly-discovered protections of this phrase that they went to most extravagant lengths in their claims for it. While the more careful writers, like Pomeroy, pointed out that it was a limitation on the legislature as well as on the executive,[11] Paschal declared that it prohibited the legislature from passing *ex post facto* laws,[12] and Foster maintained that if rightly interpreted, the phrase would free the slaves.[13] But in spite of such fantastic attempts to broaden the application of the Fifth Amendment, its procedural aspects continued to be in the foreground, and every writer devoted almost all of his discussion to them.[14] The importance of these authors lies not so much in the actual influence which they exerted on the course of legal

11 "It is plain that any statute which Congress or the legislature may see fit to pass, is not, in the sense in which the words are used in the Constitution, 'due process of law' or 'the law of the land.' Otherwise this safeguard of private rights would become a mere empty form. . . . It is not to be understood that trial by jury is an essential element in 'due process of law.'" J. N. Pomeroy, Introduction to Constitutional Law of the United States (N. Y., 1868), pp. 156-160.

12 "This means that the right of a citizen to his property, as well as life or liberty, could be taken away upon an open, public and fair trial before a judicial tribunal, according to the forms prescribed by the law of the land for the investigation of such subjects....

"The true interpretation of these constitutional phrases is that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away....

"What law? Undoubtedly a pre-existing rule of conduct, not an *ex post facto* law, rescript, or decree made for the occasion—the purpose of working the wrong.

"This is intended to secure the citizen the right to a trial according to the forms of law. But it does not apply to proceedings to collect public revenue....

"The article is a restraint on the legislative as well as on the executive branches of the government, and cannot be so construed as to leave Congress free to make any process 'due process.'" G. W. Paschal, Annotated Constitution of the United States (Wash., 1868), pp. 260, 261.

13 Daniel Foster, Lectures on the Constitution of the United States (Springfield, 1855), pp. 54, 55. See also Timothy Farrar, Manual of the Constitution of the United States (Boston, 1867), pp. 133, 134.

14 The unusual and in some cases arbitrary measures used by the North during the Civil war caused much protest on the ground that the Fifth Amendment was designed to protect the individual from just such measures. In answer to these allegations E. C. Seaman wrote his Commentaries on the Constitutions and Laws, Peoples and History of the United States (Ann Arbor, 1863), in which he stressed the procedural protections of the Fifth Amendment, but declared that they did not apply to seven types of cases. Among these are the taking of life in self-defense, to quell a riot, or to suppress a rebellion. Pages 69-116.

development, as in the fact that they represented the confused legal thinking of the time. Constitutional thought was in sore need of some one to lead it out of the maze in which it had been entrapped. It found just such a leader in Thomas M. Cooley.

§ 75. Cooley's Constitutional Limitations[15] was by far the most important treatise in the entire development of the American idea of due process of law. In many respects, he did for constitutional thought in the United States what Coke had done in England two centuries before. The importance of his writings can hardly be overemphasized. In the first place, he brought together the many loose ends of the concept of due process of law and wove them into a consistent system. By 1868, when the first edition of the Constitutional Limitations was published, a considerable body of case law interpreting and applying the due process provisions in the state constitutions had developed. Cooley was the first to make a thorough analysis of these cases and to correlate the principles upon which they rested. Other writers had received their inspiration from political philosophy or lay discussions, but Cooley went directly to the source of the law.[16]

In the second place, he was the first commentator to state clearly that due process was a limitation upon all branches of government. The provision applied not merely to judicial proceedings, executive acts, or even to legislation, but they all must co-operate to secure to the individual legal protection according to the settled maxims of law which are applicable in the particular case.[17] Indeed, he stated the case for this wide lateral scope of the protection so forcefully, that even those who were inclined

[15] T. M. Cooley, Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union (Boston, 1868). Unless specially designated, I have used the sixth edition (Boston, 1890), which was the last edition before the death of the author.

[16] In the first edition he cited over 3,000 cases at least 350 of which were discussed under topics which he included in ch. XI entitled "Of the Protection of Property by the 'Law of the Land.'"

[17] Cooley, Constitutional Limitations, pp. 505-507.

to disagree with the historical accuracy of much of his discussion, were forced to admit his correctness on this point.[18] Furthermore, by insisting that due process rested on the principles and landmarks which had been established for the protection of the citizen, he paved the way for a view which has recently attained considerable vogue.[19] Although the guarantee was to be a real one it must be adjustable to changing conditions. The common law should be the guide but not the master.[20]

In the third place, Cooley, almost single handed, caused a shift of emphasis from personal to property rights. The writers who preceded him had looked upon the protection of property rights by due process as distinctly subordinate to the protection of rights of person. Cooley, however, with his careful study of the judicial decisions, saw that since property rights were more apt to cause litigation, the phrase was bound to become the bulwark of the propertied classes.[21] While he failed to see the extent to which the courts might go in this direction, it is significant that he should have foreshadowed this trend. The fields of procedure and special legislation had been rather fully worked out by the courts by the end of the Civil War,[22] and Cooley took those decisions and made from them a coherent system of legal thought.[23] But he went further and suggested that the powers of police, taxation, and even eminent domain might come under the limitation of the Fourteenth Amendment. Furthermore, it was not merely the procedure employed in the exercise of these powers which

[18] E. g., W. W. Willoughby, Constitutional Law in the United States (N. Y., 1910), Vol. II, pp. 856-868.

[19] C. E. Merriam, American Political Ideas, 1865-1917 (N. Y., 1920), pp. 177 ff.

[20] Cooley, Constitutional Limitations, pp. 509-511. See also in this regard Emory Washburn, "The Origin and Sources of the Bill of Rights Declared in the Constitution of Massachusetts," Proceedings of the Massachusetts Historical Society, 1864, 1865, Vol. VIII (June 1865), pp. 254-313.

[21] Cooley, Constitutional Limitations, pp. 508, 509.

[22] See *post* chs. XII, XIII.

[23] T. M. Cooley, General Principles of Constitutional Law (Boston, 1898, first ed. Boston, 1880), ch. XIII, sec. iv, pp. 240-267.

he had in mind, for he declared that in each case the "purpose must be public."[24]

His thought in this regard was not as clear cut as it was in many other respects, and the organization of the Constitutional Limitations does not bring out clearly the close relationship between the limitation and each of these powers.[25] The seeds of the idea were there and the rapidly changing economic conditions caused them to grow to fruition at the hands of others.

§ 76. The influence of Cooley upon both bench and bar persisted for more than a quarter of a century after his death. As professor in one of the foremost law schools of the country,[26] and as Chief Justice of the Supreme Court of Michigan for two decades, he was able to bring much of the legal thinking to his viewpoint.[27] It would not be extravagant to say that the Constitutional Limitations was more often cited in every American court during the last half of the nineteenth century than any other work on constitutional law.[28] His views fitted admirably the

[24] Cooley, Constitutional Limitations, p. 435.

[25] Thus he interposes between his chapter on "The Protection of Property by the 'Law of the Land,'" and the chapters on "The Power of Taxation," "The Eminent Domain," and "The Police Power of the States," two chapters on freedom of speech, press and religion. Constitutional Limitations. Note also that in his Treatise on the Law of Taxation including Local Assessments (Chicago, 1876), pp. 36-40, he points out that due process is a limitation on tax procedure but omits all mention of the phrase when he discusses public purpose in taxation.

[26] He delivered lectures at both the University of Michigan and at Johns Hopkins University. It has been said that he had more students in law and political science in his classes than any other professor of his time. National Cyclopedia of American Biography (N. Y., 1907), Vol. IX, p. 522.

[27] His subtle influence upon the development of constitutional law seems to have been only slightly recognized at the time. In Memoriam Thomas McIntyre Cooley, 119 Mich. (1898), pp. xxvii-lxiii. This may be considered as evidence of the fact that he expressed the dominant ideas of the time and rather than striking revolutionary doctrines. His work was essentially synthetical.

[28] It is classed with the works of Blackstone and Kent by A. F. Mason in R. W. Cooley and C. L. Ames, Brief Making and the Use of Law Books (St. Paul, 1914), p. 63. Although he was a voluminous author his reputation rested mainly on his first book, the Constitutional Limitations. J. C. Knowlton, "Thomas McIntyre Cooley," Michigan Law Review, Vol. V (March, 1907), p. 314.

protests of the legal profession against the rising tide of legislative interference with personal, and more particularly, property rights,[29] and of all the legal writers of his time, he seems to have been the only one who had direct influence on political science.[30]

The views of Cooley gradually came to be accepted by the more advanced legal writers, many of whom followed his analysis of due process with remarkable closeness even though they were unable to agree with him on many minor points.[31] Indeed it was some time before any significant addition was made to his contribution. Some of the commentators on the police power completely failed to catch the significance of his analysis, and if they saw in due process a limitation on that power at all, continued to think of it as merely a procedural restriction.[32] In 1891 Meyer published his collection of cases and notes on Vested Rights, in which he definitely classified the police power under due process of law.[33] This work was prepared pri-

[29] This movement is described by Charles Warren, The Supreme Court in United States History (Boston, 1922), Vol. III, pp. 314-316.

[30] When James Bryce undertook to write the American Commonwealth, he got in touch with Cooley and was given much help by him. National Cyclopedia of American Biography, Vol. IX, p. 522. He cites Cooley twenty-three times and seems to have relied upon him almost exclusively for his information regarding American constitutional law. See preface to the first edition (N. Y., 1888).

[31] Herman Von Holst, Constitutional Law of the United States (Translated by A. B. Mason, Chicago, 1887), pp. 251-257; J. I. C. Hare, American Constitutional Law (Boston, 1889), Vol. II, chs. 34-39; W. G. Meyer, Vested Rights. Selected Cases and Notes on Retrospective and Arbitrary Legislation affecting Vested Rights of Property (St. Louis, 1891), *passim.*; W. D. Guthrie, Fourteenth Amendment (Boston, 1898), pp. 66-73; Henry Brannon, Treatise on the Rights and Privileges Guaranteed by the Fourteenth Amendment (Cincinnati, 1901), pp. 148-160, 168 ff.; Ernst Freund, Police Power (Chicago, 1904), sec. 30.

[32] C. G. Tiedeman, Treatise on the Limitations of the Police Power in the United States (St. Louis, 1886), pp. 70-72; W. P. Prentice, Police Powers arising under the Law of Overruling Necessity (N. Y., 1894), p. 48; Alfred Russell, The Police Power of the State (Chicago, 1900), pp. 38, 66; Brannon, Fourteenth Amendment, pp. 168 ff.

[33] In the preface he declared that the great protector of vested rights was the due process provision. His notes to the cases quoted are very full and give a large number of cases decided under the due process provision before that time. There are five chapters dealing with the due process clause: 1. General Principle; 2. Notice and Hearing; 3. Summary Proceedings; 4. Police Power; 5. Laws affecting the Remedy. W. G. Meyer, Vested Rights, *passim.*

marily for class-room use and seems to have had little influence upon the legal profession generally. The same year Ordronaux caught a glimpse of the connection between due process and equality, [34] a relationship which Parker applied to the police power the year following.[35] The development of due process as a police power limitation was undoubtedly retarded by a series of adverse statements by the United States Supreme Court beginning with the Legal Tender Cases,[36] and it remained for Professor Freund in his epoch-making work The Police Power (1904) to bring out clearly the function of due process as a restriction on the abuses of that extensive power.[37] Since that time there has been little question that the Fourteenth Amendment does restrict the exercise of the police functions of the states.

§ 77. Even Cooley had not seen clearly the relation between due process and the powers of taxation and eminent domain.[38] His Treatise on the Law of Taxation was published the year following the Topeka Bridge Company Case,[39] and one may hardly wonder that the full implications of it were not perceived. Desty, writing ten years later, thought due process referred only to the procedure in tax cases,[40] and the writers on eminent domain of this period held similar views.[41] Brannon, writing in 1901,

[34] John Ordronaux, Constitutional Legislation in the United States (Phila., 1891), p. 255.

[35] LeRoy Parker and R. H. Worthington, Law of Public Health and Safety, and the Powers and Duties of Boards of Health (Albany, 1892), pp. 21-23.

[36] Legal Tender Cases, 12 Wall. (U. S., 1870) 457, 20 L. ed. 287; Slaughter House Cases, 16 Wall. (U. S., 1873) 36, 21 L. ed. 394; Davidson v. New Orleans, 96 U. S. (1877) 97, 24 L. ed. 616; Barbier v. Connolly, 113 U. S. (1885) 27, 28 L. ed. 923. See *infra*, secs. 122, 123.

[37] Freund, The Police Power, sec. 20.

[38] *Supra*, sec. 75. See also T. M. Cooley, Treatise on the Law of Taxation including the Law of Local Assessments (Chicago, 1876), pp. 36-40.

[39] Loan Assn. v Topeka, 20 Wall. (U. S., 1875) 655, 22 L. ed. 455.

[40] Robert Desty, American Law of Taxation (St. Paul, 1884), Vol. II, pp. 749-752.

[41] H. E. Mills, Law of Eminent Domain (St. Louis, 1888), sec. 92; C. F. Randolph, Law of Eminent Domain in the United States (Boston, 1894), p. 34.

seems to have been the first commentator to have caught anything of the significance of the way in which the courts were rapidly drifting, but even he failed to see the importance of the movement. Most of his discussion was devoted to the procedural aspects, and his recognition that the Fourteenth Amendment also required a public purpose in taxation and eminent domain seems to have been only an afterthought.[42] Gray, in his Limitations of the Taxing Power (1906), caught the significance of the situation. He pointed out that due process required just classification and jurisdiction in taxation as well as public purpose and procedure, and he took particular pains to demolish the time worn distinction between procedural and substantive rights.[43] Three years later the wide application of due process of law as a limitation on the powers of the states was recognized by Page and Jones in regard to taxation,[44] and by Nichols in respect to eminent domain.[45]

§ 78. When specialists in specific subjects failed to see the scope of the Fourteenth Amendment when applied to the police power, eminent domain, and taxation, there is little wonder that the compilers of general texts and annotators of the constitutions should have progressed so

[42] Brannon, Fourteenth Amendment, pp. 148-160. See also ch. 22.

[43] "A strict interpretation of the words 'due process of law' would limit their effect to matters of procedure rather than of substantive law. The majority of the cases on the subject do undoubtedly refer to questions of procedure, classifying notice and hearing as subjects of procedure. But these rights as to procedure which attain to the dignity of constitutional rights are so substantial that the distinction between them and real substantive rights is very shadowy, to say the least." M. M. Gray, Limitations of the Taxing Power (San Francisco, 1906), pp. 557, 558. He recognized that due process limited both taxation and eminent domain to use for a public purpose. *Ibid.*, As to the relation between equality and taxation see *Ibid.*, pp. 647, 726.

For a recent statement of the distinction between procedural and substantive rights see F. A. Ogg and P. O. Ray, Introduction to American Government (N. Y., 1922), pp. 77-79.

[44] W. H. Page and Paul Jones, Treatise on the Law of Taxation by Local and Special Assessments (Cincinnati, 1909), Vol. I, secs. 115-148. But note also that C. H. Hamilton, Treatise on the Law of Taxation by Special Assessments (Chicago, 1907), declared that due process referred only to the procedure in taxation. *Ibid.*, secs. 134-150.

[45] Philip Nichols, Power of Eminent Domain (Boston, 1909), secs. 30, 31, 205.

slowly. Pence in 1891 was a voice crying in the wilderness when he argued that the purpose of the Fourteenth Amendment was to protect the individual from state laws infringing any of the First Ten Amendments.[46] Freund was undoubtedly ahead of his time when he declared that "each governmental power has its inherent law" and indicated that that law was due process.[47] Even as late as 1910, Reeder made a spirited plea for the restriction of the scope of due process to procedural rights and declared that it had no relation to substantive protections.[48] Only a few years ago Charles Warren maintained that the Supreme Court had developed no new principle of due process since 1888.[49] It is believed that Professor Hall produced in 1910 the first general text-book on constitutional law in which the wide scope of due process was recognized.[50] Likewise, although annotations had been frequently made for Federal and State Constitutions, the first one to classify the cases under due process in a proper manner was published only three years ago.[51]

[46] C. R. Pence, "The Construction of the Fourteenth Amendment," American Law Review, Vol. 25 (July-Aug., 1891), pp. 536-550.

[47] "Each governmental power has its inherent law, and this law which the due process of the constitution implies and supports stands above legislation and the legislature, and is enforced by the courts in the ordinary administration of justice." Freund, Police Power, sec. 20.

[48] R. P. Reeder, "The Due Process Clause and the Substance of Individual Rights," University of Pennsylvania Law Review, Vol. 59 (Jan., 1910), pp. 191-218.

[49] "In interpreting the Fourteenth Amendment, while the Court has shown a consistent and progressive tendency to uphold the legislation of the States, it has developed no new principle which was not already established or foreshadowed before the death of Waite. Its work has been largely in applying settled principles to new conditions and to new forms of legislation." Charles Warren, The Supreme Court in United States History (Boston, 1922), Vol. III, pp. 415, 416.

[50] J. P. Hall, Constitutional Law (Chicago, 1910), pp. 158-197. See also J. P. Hall, Cases on Constitutional Law (St. Paul, 1912), pp. 535-660.

But scanty recognition of the wide scope of due process was given in the exhaustive work of D. K. Watson, The Constitution of the United States (Chicago, 1910), 2 Vols., or the smaller text by H. C. Black, Handbook on Constitutional Law (St. Paul, 1897).

The best recent text on Constitutional Law follows the classification of Hall. C. K. Burdick, Law of the American Constitution (N. Y., 1922), chs. 28-32.

[51] G. G. Payne (comp.), The Constitution of the United States of America as amended to January 1, 1923, Annotated (Senate Document,

The failure of text-writers and commentators to keep abreast of the decisions of the court caused the current conceptions of the law to drag. Had it not been for stern economic conditions it is not probable that the legal profession would have goaded the court into a recognition of the wide scope of the Fourteenth Amendment. With the courts won over to the broader interpretation it is but a matter of time until the commentators would follow. For real leadership in the development of the law in America, therefore, we must look to the cases themselves. The constituent bodies, assembled for the sole purpose of framing our fundamental laws, failed to produce any significant interpretations of the classic phrase from Magna Carta, and the authors of legal texts declined to take the leadership. If leadership in American law was to be had, it was obvious that it must come from the courts.

At the same time, both the members of constitutional conventions and the commentators frequently desisted from any attempt to discuss this protection too specifically, because of the inherent feeling of the generality of the rights which it secured. Some writers from the very first saw that the phrase was capable of a very wide extension, both vertically and horizontally, and under the able leadership of Cooley an important step was taken to suggest the lines along which that extension might develop. Natural forces did the rest, and for the study of the operation of those forces we must turn to the decisions of the courts.

Vol. 3, 76th Cong., 2d Sess. Serial No. **7962,** Wash., 1923). See also H. F. Kumm, The Constitution of Minnesota, Annotated (Bureau for Research in Government of the University of Minnesota, publications, number 3, Minneapolis, 1924).

It is interesting to compare these excellent and comprehensive annotations with that of Orlando F. Bump, Notes of Constitutional Decisions: Being a Digest of the Judicial Interpretations of the Constitution of the United States (N. Y., 1874), which devotes but five of its four hundred pages to due process. Payne devotes seventy-eight of his seven hundred pages to these words and Kumm gives twenty-one of his two hundred and forty pages to them.

For a criticism of these and other annotations see a book review by the author in Michigan Law Review, Vol. XXIII (Apr. 1925), pp. 686-691.

PART FIVE.

DUE PROCESS AND PROCEDURE.

CHAPTER XII.

THE LEGISLATURE AND PROCEDURE.

§ 79. Decisions interpreting the meaning of due process of law or the law of the land were very scattered in the early annals of the American courts. A mere handful of cases were decided in which these phrases had been considered at all, and scarcely any of these undertook to give even as much as a summary definition of their meaning until thirty-two years after they first appeared in a State Bill of Rights. The first attempt at a judicial definition of either of these clauses shows that the courts had taken their meaning for granted, and consequently, had given them very little thought.[1] The only problem which was seriously raised by any number of decisions during this period was whether this clause limited the power of the legislature or merely the executive.

The answer to this problem was strikingly uniform. With the exception of *dicta* in two cases, the courts with one accord held that the "law of the land" was not simply

[1] "As to the words from the Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this; that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." Justice Johnson, Bank of Columbia v. Okely, 4 Wheat. (U. S. 1819) 235 at 244, 4 L. ed. 559.

any law the legislature might enact. The first of these cases was one of the earliest cases in which there is a reference to this phrase, and the court was considerably put to it to justify the use of distress warrants for the summary collection of taxes.[2] This case, however, can hardly be cited to prove that the early courts looked upon any process authorized by the legislature as due process, for in the report of the case we have only the opinion of the dissenting judge and the attorney general. There is, furthermore, evidence that one of the justices concurred in the result only because of other reasons.[3] Seven years previously, the same court had refused to enforce an act confiscating lands of English subjects because it violated the "law of the land,"[4] and within two decades it declared two other acts void for the same reason.[5] The attorney general himself repudiated his former statement in one of

[2] State v. ———, 1 Hay. (N. Car., 1794) 28. A statute authorized the attorney general to proceed in a summary fashion to collect overdue taxes. No notice, hearing, or trial was necessary to give legality to the procedure as specified in the act.

[3] "These words mean, according to the course of the common law; which always required the party to be cited and to have a day in court upon which he might appear and defend himself." Judge Williams (dissenting), 1 Hay. 28. Judge Ashe concurred with Judge Macay "only after much deliberation and uncertainty" because the latter had given very strong reasons. But we have no evidence that the arguments advanced by the attorney general formed the basis of the reasons which actuated either of the judges. He claimed that inasmuch as the clause means the same as it did in Magna Carta it was "not intended to restrain the legislature from making the law of the land, but a declaration only, that the people are to be governed by no other than the law of the land." The term *per legem terrae* was used in contradistinction with the Civil or Italian law which the English did not approve. "In our constitution where the convention are declaring the rights of the people, and use the words of the Magna Charta of England, they mean to assert in general, that the people of North-Carolina have a right to be governed by their own laws, and not to be subject to laws made by any foreign power upon earth." *Ibid.*, 29-33.

[4] These lands had been resold to American buyers and the legislature tried to make this resale a complete bar to an action on the part of the former owners for recovery. The courts refused to enforce the second act on the ground that it violated both the trial by jury and the law of the land provisions of the constitution. Bayard v. Singleton, 1 Martin (N. Car., 1787) 48.

[5] Trustees of the University v. Foy, 1 Murphy (N. Car., 1805) 58, 3 Am. Dec. 672; Hamilton v. Adams, 2 Murphy (N. Car., 1812) 161. In these cases the decision was unanimous on this point.

these cases.[6] A half century later the United States Supreme Court clearly differentiated this type of case from the ordinary case of procedure.[7] In view of these considerations, this must be regarded as an exceptional case, and one can hardly infer that even the North Carolina court considered that this clause had no value as a limitation on the legislative department of government.

A clearer case, however, arose in New Hampshire. A Sunday law provided for summary detainment of any one who should travel "unnecessarily" on that day. The defendant's counsel raised strenuous objections to this act on the ground that it was not a valid procedure under the "law of the land." The court, however, overruled him and laid down in the most sweeping language that the legislature could make the law of the land.[8] This doctrine was literally followed by the same court in its decision in the Dartmouth College Case.[9]

§ 80. These two cases seem to have been the exceptions to the general rule, for even where the courts refused to declare a law void as violating due process they were careful not to let slip any *dictum* to the effect that this phrase did not limit the legislature. One of the most interesting of these opinions was rendered in a South Carolina case involving the power of eminent domain.[10] Al-

[6] Trustees of the University v. Foy, 1 Murphy (N. Car., 1805) 58, 3 Am. Dec. 672.

[7] Murray v. Hoboken Land & Imp. Co., 18 How. (U. S., 1855) 272, 15 L. ed. 372.

[8] Chief Justice Richardson declared that he would follow the meaning of the article as it was at the time of the Great Charter. "We think the 15th article in our Bill of Rights was not intended to abridge the power of the legislature, but to assert the right of every citizen to be secure from all arrests nor warranted by law." Mayo v. Wilson, 1 N. H. (1817) 53 at 57.

[9] Dartmouth College v. Woodward, 1 N. H. (1817) 111. Chief Justice Richardson declared: "It is evident from all the commentaries upon it by English writers, that it was intended to limit the powers of the crown and not of parliament . . . . All statutes not repugnant to any other clauses in the constitution seem always to have been considered as 'law of the land' within the meaning of this clause." To rule otherwise would make the whole statute book a dead letter. 65 N. H. (1817) 473 at 637.

[10] The legislature authorized the city commissioners to take the property of the plaintiffs without compensation in order to put a street through

though the court was evenly divided on the question of the power to appropriate land for a street without compensation, neither the judges nor the attorneys suggested that the legislature was not limited by the law of the land. Those who approved of the proceedings declared that the power to take private property for public use was older than Magna Carta and so was a part of the law of the land.[11] Two important features of this case should be noted. In the first place, as early as 1796 two judges of the court felt that due process was a limitation upon the power of eminent domain, a viewpoint which did not finally prevail until the very end of the next century.[12] In the sec-

their property. The costs of the street were to be assessed upon the abutting property owners. The property owners petitioned for an injunction to prevent the taking of their property but this failed in a divided court. Lindsay et al. v. Commissioners, 2 Bay (S. Car., 1796) 38.

[11] This was the argument of Holmes, the city recorder, and was repeated by Justices Grimke and Bay. The attorney general, Mr. Pringle, made an elaborate argument to the effect that the power of eminent domain was founded on natural justice and had been so recognized by legal philosophers.

On the other hand the attorney for the property owners, Mr. Desaussure, pointed out that due process limits the acts of the legislature and that it is unconstitutional to confiscate property. To support his views he cited "the opinion of the federal court in the celebrated Wyoming Case, as delivered by Judge Paterson, in which it was determined, that the legislature of Pennsylvania 'had no right or power to pass a law to determine or take away the right of one of the contending parties to a freehold, and give it to another.'" Lindsay et al. v. Commissioners, 2 Bay (S. Car., 1796) 38 at 40. He probably had reference to Van Horne's Lessee v. Dorrance, 2 Dall. (U. S., 1795) 304 at p. 310, 1 L. ed. 391. See sec. 81.

Justices Burke and Waite followed the argument of Desaussure and contended that whenever the power of eminent domain was used compensation must be made. If this were not done the procedure would violate the law of the land. "If the *lex terrae* meant any law which the legislature might pass, then the legislature would be authorized by the constitution, to destroy the right, which the constitution had expressly declared, should forever be inviolably preserved. This is too absurd a construction to be the true one. He said he understood, therefore, the constitution to mean that no freeman shall be deprived of his property but by such means as are authorized by the ancient common law of the land." *Ibid.*, p. 59. They further contended that their position was founded on natural justice. *Ibid.*, p. 61.

[12] This point was not definitely decided until Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. (1897) 226, 41 L. ed. 979. Furthermore, the South Carolina court was undoubtedly impressed with the benefit which would accrue to the property-owners from the proposed street. That special benefits may be off-set against the compensation necessary is not clearly settled at the present time. C. K. Burdick, Law of the American Consti-

ond place, the admission by all that *lex terrae* was a limitation on the legislature shows how widely that viewpoint was held. Furthermore, that it should not have been questioned in so difficult a case shows how firmly rooted the opinion must have been.

A case of another type but of like difficulty arose in Virginia in 1804. The acts which disestablished the Church of England were attacked on the ground that they violated the fundamental law of the land.[13] The case was so close that the death of one of the justices the night before the decision produced a divided court. The statutes were upheld, but upon appeal to the United States Supreme Court the decision was reversed.[14] In spite of the closeness of the case none of the judges questioned the validity of due process of law as a limitation on the legislative power and those upholding the law did so on the ground that the Bill of Rights did not protect corporations as it did individuals.[15] Other courts, when confronted with difficult cases involving this clause, preferred to eliminate the arbitrary effect of the statute by straining its construction,[16] or by making it apply only prospectively,[17] rather than impair potency of due process of law as a legislative check.

tution (N. Y., 1922), sec. 264. Even in the question of general benefits some doubt exists as the result of Walston v. Nevin, 128 U. S. (1888) 578, 32 L. ed. 544, and McCoy v. Union Elev. R. Co., 247 U. S. (1918) 354, 62 L. ed. 1156. One can hardly wonder at the difficulty the South Carolina court had with the case.

[13] The statutes confiscated the glebe lands which the Episcopal Church had acquired before the Revolutionary War. Turpin v. Locket, 6 Call. (Va., 1804) 113.

[14] Justice Pendleton who believed the statutes were unconstitutional died the night before the decision was rendered. Two of the remaining justices declared the act void and two upheld it. *Ibid.* The decision was reversed on other grounds in Terret v. Taylor, 9 Cranch (U. S., 1815) 43, 3 L. ed. 650.

[15] See particularly the argument of Justice Tucker. Justice Roane upheld the acts only because he believed that the lands had never been vested in the church. Turpin v. Locket, 6 Call. (Va., 1804) 113.

[16] "Courts are bound to give such a construction to a statute as was consistent with justice, though contrary to the letter of it." Chancellor Kent, Dash v. Van Kleeck, 7 Johns. (N. Y. Ch., 1811) 477, 5 Am. Dec. 291.

[17] Osborne v. Huger, 1 Bay (S. Car., 1791) 179; Carter v. Tyler, 1 Call. (Va., 1797) 165; Elliott's Executors v. Lyell, 3 Call. (Va., 1802) 268; Commonwealth v. Duane, 1 Binney (Pa., 1809) 601, 2 Am. Dec. 497; Bed-

The fact that the vast majority of the early decisions related to questions of procedure can hardly be taken as proof that the courts did not look upon due process as a limitation upon legislative power; for in nearly every instance where the legislature changed the procedure in an arbitrary manner the courts declared that it was not the "law of the land." Thus in Zylstra v. Charleston the court declared that although due process of law did not guarantee a trial by jury, it certainly did not permit the legislature to allow summary convictions.[18] The same court, a short time afterward, went so far as to declare that the adoption of the constitution crystallized the forms of procedure then extant so that they could not be changed by statute.[19] The North Carolina court looked upon this protection as guaranteeing "a trial by jury in a court of justice, according to known and established rules of decision, derived from the common law and such acts of the legislature as are consistent with the Constitution."[20] Hence it was necessary that there be notice and hearing,[21] and a Massachusetts decision held that a hearing before a legis-

ford v. Shilling, 4 Serg. & R. (Pa., 1818) 401, 8 Am. Dec. 718; Duffield v. Smith, 3 Serg. & R. (Pa., 1818) 590; Brunswick v. Litchfield, 2 Greenl. (Maine, 1822) 28; Boyce v. Holmes, 2 Ala. (1841) 54; Commercial Bank v. Chambers, 16 Miss. (1847) 9; Greenough v. Greenough, 11 Pa. (1849) 489; Perkins v. Cottrell, 15 Barb. (N. Y., 1851) 446; Price v. Hopkins, 13 Mich. (1865) 318.

[18] 1 Bay (S. Car., 1794) 382. This was a case where the council of Charleston fined the plaintiff for keeping a tallow chandler's shop within the city. It was objected that there had been no jury trial and one of the justices (Judge Waites) declared that the legislature could not give the council power to levy punishments without a regular judicial procedure for to do so would violate the law of the land.

[19] White v. Kendrick, 1 Brev. (S. Car., 1805) 469. Judge Wills declared that the law of the land did not insure a trial by jury in all cases but only such form of trial as was in vogue when the constitution was adopted. Hence the legislature could not increase the jurisdiction of justices of the peace to cover cases amounting to $30 where it had formerly been $20.

[20] Trustees of the University v. Foy, 1 Murphy (N. Car., 1805) 58 at 88, 3 Am. Dec. 672. The legislature in this case attempted to take away certain lands which it had granted to the state university eleven years earlier. This was held to be unconstitutional because a judgment by the legislature was not due process of law, even the dissenting judges agreeing that the legislature could not change the law of the land.

[21] Hamilton v. Adams, 2 Murphy (N. Car., 1812) 161.

lative committee was by no means enough to warrant interference with vested rights.[22]

§ 81. In order to understand the basis of the extensive control which the courts were to exercise over legislative acts through the due process provision, we must turn to the line of cases which preceded the Dartmouth College decision. The idea of declaring laws invalid because they were opposed to common right and reason, the inherent principles of good government, or Magna Carta was as old as it was common in the earlier state decisions. It may be traced, like so many other judicial doctrines in American law, to Coke[23] and had been so widely recognized in colonial times that there is small wonder that it should have flourished in the early state decisions. Thus in South Carolina an *ex post facto* law,[24] a law arbitrarily changing the rights of inheritance,[25] and one emancipating the slaves of one person[26] were all held void on these grounds. In New York the doctrine of common right and reason was discussed with approval in an eminent domain case as one of the elements of due process of law,[27] a viewpoint which

[22] Holden v. James, 11 Mass. (1814) 396, 6 Am. Dec. 174. This case caused considerable discussion. See 13 American Jurist, pp. 72-105; 14 American Jurist, pp. 83-100.

[23] Calvin's Case, 4 Coke (1609) 14.

[24] Ham v. McClaws and Wife, 1 Bay (S. Car., 1789) 93. This act prohibited the importation of slaves after a certain date. Before that date the defendants had sailed from Honduras with their servants and the court refused to apply the law in their case. "Statutes passed against the plain and obvious principles of common right, and common reason are absolutely null and void, as far as they are calculated to operate against those principles." The statement of the attorney for the defendant is significant: "There were certain fixed and established rules, founded on the reason and fitness of things, which were paramount to all statutes; and if laws are made against those principles, they are null and void. For instance, statutes made against common right and reason, are void." See also Osborne v. Huger, 1 Bay (S. Car., 1791) 179 at 193. A similar act operating only prospectively was held constitutional in Wilson v. Isbell, 5 Call. (Va., 1805) 425.

[25] Bowman v. Middleton, 1 Bay (S. Car., 1792) 252.

[26] Allen v. Peden, 5 N. Car. (1804) 442.

[27] Gardner v. Newburgh, 2 Johns. (N. Y. Ch., 1816) 162. A statute providing for the taking of water without compensation to the owners of water rights was declared void because there had been neither compensation nor due process of law. Chancellor Kent pointed out that the latter

was reflected in other fields in the federal courts both circuit and Supreme.[28] The classic statement of this attitude is that of Justice Chase in Calder v. Bull, from which but one member of a court of four justices dissented.[29] This

was "an ancient and fundamental maxim of common right to be found in Magna Charta, and which the legislature has incorporated into an act declaratory of the rights of the citizens of this state." A similar attitude is reflected in Taylor v. Porter, 4 Hill (N. Y., 1843) 140, 40 Am. Dec. 274; People v. Smith, 21 N. Y. (1860) 595; Foster v. Essex Bank, 16 Mass. (1819) 245, 8 Am. Dec. 135; Lindsay v. Commissioners, 2 Bay (S. Car., 1796) 38.

[28] The caustic remarks of Justice Patterson excoriating the Pennsylvania legislature for passing a law settling and quieting titles to land shows this tendency from another angle. "Shame to American legislation! That in England, a limited monarchy, where there is no written constitution, where the Parliament is omnipotent, and can mould the Constitution at pleasure, a more sacred regard should have been paid to property, than in America, surrounded as we are with a blaze of political illumination; where the legislatures are limited; where we have republican governments, and written constitutions, by which the protection and enjoyment of property are rendered inviolable." Van Horne's Lessee v. Dorrance, 2 Dall. (U. S., 1795) 304 at 314, 1 L. ed. 391. See also Calder v. Bull, 3 Dall. (U. S., 1798) 386, 1 L. ed. 648; Fletcher v. Peck, 6 Cranch (U. S., 1810) 87 at 135 and 139, 3 L. ed. 162.

[29] "I cannot subscribe to the omnipotence of a state legislature or that it is absolute and without control; although its authority should not be expressly restrained by the constitution, or fundamental law of the state. . . . There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . . A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys or impairs, the lawful private contracts of citizens; a law that makes a man a judge of his own cause; or a law that takes property from A and gives it to B: It is against all reason and justice for a people to intrust a legislature with such powers; and therefore, it cannot be presumed that they have done it." This was purely *dicta* and Justice Iredell dissented: "It is true, that some speculative jurists have held, that a legislative act against natural justice must in itself, be void; but I cannot think, that under such a government any court of justice would possess a power to declare it so." Calder v. Bull, 3 Dall. (U. S., 1798) 386 at 387, 388, 1 L. ed. 648.

It seems, however, that Justice Chase considered these general principles rather as subject to judicial discretion than binding upon the courts. The courts were to use them when they disapproved of legislation but not when they considered it wise. "The general principles contained in the constitution are not to be regarded as rules to fetter and control, but as matter merely declaratory and directory." Cooper v. Telfair, 4 Dall. (U. S., 1800) 14, 1 L. ed. 721.

doctrine is peculiarly significant in view of the fact that subsequently many of the types of laws which were considered as contrary to natural right and reason have been included under the due process protection.[30] The turning point was undoubtedly the Dartmouth College Case, although for many years after that decision, the courts continued to decide cases on the basis of natural rights and common justice.[31] As late as 1874 Justice Miller of the United States Supreme Court used a refined form of this argument in declaring unconstitutional the appropriation of public funds for private purposes.[32]

§ 82. One of the most important components of the concept of natural right as a limitation on legislative power was the doctrine that vested rights must not be disturbed.[33]

[30] Note specially Ervine's Appeal, 16 Pa. (1851) 256, 55 Am. Dec. 499, and East Kingston v. Towle, 48 N. H. (1868) 57, 97 Am. Dec. 575, 2 Am. Rep. 174, where it was pointed out that the law of the land was founded on natural justice.

[31] Marr v. Enloe, 1 Yerg. (Tenn., 1830) 452; Varick v. Smith, 5 Paige (N. Y. Ch., 1835) 137, 28 Am. Dec. 417; Regents of the University v. Williams, 9 Gill & J. (Md., 1838) 365 at 409; Cochran v. Van Surlay, 20 Wend. (N. Y., 1838) 365; Riggs v. Martin, 5 Ark. (1844) 506; Brown v. Hummel, 6 Pa. (1847) 86; People v. Supervisors of Westchester, 4 Barb. (N. Y., 1848) 64; Arrowsmith v. Burlingim, 1 Fed. Cas. (1848) 1187; White v. White, 5 Barb. (N. Y., 1849) 474; Greene v. Briggs, 1 Curtis (1852) 311, Fed. Cas. No. 5764; State v. Wapello, 13 Iowa (1862) 388. See also Ernst Freund, Standards of American Legislation (Chicago, 1917), pp. 193-200.

[32] "There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C and B the wife of D; or which should enact that the homestead now owned by A should no longer be his, but shall henceforth be the property of B." Loan Association v. Topeka, 20 Wall. (U. S., 1874) 655 at 663, 22 L. ed. 455. Justice Clifford dissented for the reason that he was unable to subscribe to this doctrine.

[33] The close relation between the two concepts is shown by the following argument of the defendant's counsel in Osborne v. Huger, 1 Bay (S. Car., 1791) 179 at 193. This argument was subsequently adopted by the court. "If the construction contended for by the plaintiffs would make this act substantially retrospective, or give it the operation of an *ex post facto* law or law impairing the obligation of contracts, or a law to devest rights antecedently vested, the court can never accede to it. For, it is equally unconstitutional and repugnant to all the principles of the common law,

This principle is likewise of English origin, having been first clearly enunciated in 1769,[34] although there are traces of the doctrine earlier.[35] As stated in the English cases, the concept was merely that general provisions of a statute should not be construed to cover particular cases where rights antecedently vested were involved. But, carried over into American law, it soon came to mean that, once the legislature had vested a right, that right could not be taken away by subsequent legislation.[36] As thus developed, the doctrine was widely accepted,[37] although it was not until after the Dartmouth College Case that it seems to have been given authoritative sanction. It was subsequently followed in a very considerable number of cases,[38] and about the middle of the century, it began to be blended

which says that a statute against common rights and common reason is void." See also People v. Supervisors of Westchester, 4 Barb. (N. Y., 1848) 64.

[34] Couch v. Jeffries, 4 Burrows (1769) 2460, was a suit for the amount of a stamp-tax required by act of Parliament. A subsequent act extended the date at which the tax could be paid but the collector claimed the right to the tax under the earlier law, which claim was allowed. Lord Mansfield declared that "here a right is vested: and it is not to be imagined that the legislature could by general words mean to take it away from the person in whom it was so legally vested; and who had been at a great deal of cost and charge in prosecuting. They certainly meant future actions. Otherwise, it would be punishing the innocent instead of the guilty. It can never be the true construction of this act; to take away this vested right, and punish the innocent pursuer of it with costs."

[35] Case of Alton Woods, 1 Coke (1600) 47.

[36] In some of the American cases the English precedents for this doctrine are cited. For example, Elliott's Executors v. Lyell, 3 Call. (Va., 1802) 268, quotes from Couch v. Jeffries, putting the part concerning vested rights in italics.

[37] Osborne v. Huger, 1 Bay (S. Car., 1791) 179; Wales v. Stetson, 2 Mass. (1806) 143, 3 Am. Dec. 39; Commonwealth v. Duane, 1 Binney (Pa., 1809) 601; McMechan v. Baltimore, 2 Harr. & J. (Md., 1806) 41; Foster v. Essex Bank, 16 Mass. (1819) 245, 8 Am. Dec. 135.

[38] Goshen v. Stonington, 4 Conn. (1822) 209, 10 Am. Dec. 121; Wilkinson v. Leland, 2 Pet. (U. S., 1829) 627, 7 L. ed. 542; Brunswick v. Litchfield, 2 Greenl. (Maine, 1832) 28; Watson v. Mercer, 8 Pet. (U. S., 1834) 88, 8 L. ed. 876; State v. Heyward, 3 Rich. (S. Car., 1832) 389; Varick v. Smith, 5 Paige (N. Y. Ch., 1835) 137, 28 Am. Dec. 417; James v. Dubois, 16 N. J. L. (1837) 285; Riggs v. Martin, 5 Ark. (1844) 506; People v. Supervisors of Westchester, 4 Barb. (N. Y., 1848) 64 at 75; Harrington v. Berkshire County, 22 Pick. (Mass., 1839) 263; Billings v. Hall, 7 Cal. (1857) 1; Cotten v. Ellis, 52 N. Car. (1860) 545; Officer v. Young, 5 Yerg. (Tenn., 1833) 320, 26 Am. Dec. 268; Rice v. Parkman, 16 Mass. (1820) 326.

with the concept of due process of law. Some courts put the cases on both grounds of due process and vested rights,[39] but others, beginning to realize the potency of the former phrase, discontinued the expression of the vested rights and natural law doctrine in their opinions, although it is evident that they retained it in the philosophic make-up of due process.[40] This, then, came to be another component part of due process of law as it was subsequently developed.

§ 83. These various elements of legal philosophy were brought together by Webster in a definition of due process of law which has since been regarded as a classic. In contending that the legislature of New Hampshire had no legal right to revoke the charter of Dartmouth College, he pointed out that due process was of much wider scope than the courts had theretofore recognized. It was no less than a "protection of the general rules which govern society." He not only declared that it was a limitation upon the legislature in regard to procedure, but it also prohibited special legislation, legislative judgments, and even abuses of the power of eminent domain.[41] The New Hampshire

[39] Holmes v. Holmes, 4 Barb. (N. Y., 1848) 295; East Kingston v. Towle, 48 N. H. (1868) 57, 97 Am. Dec. 575, 2 Am. Rep. 174. Judge Mason, White v. White, 5 Barb. (N. Y., 1849) 474 at 484, declared: "The security of the citizen against such arbitrary legislation rests upon the broader and more solid ground of natural rights, and is not wholly dependent upon these negatives upon the legislative power contained in the constitution."

[40] Westervelt v. Gregg, 12 N. Y. (1854) 202, 62 Am. Dec. 160; Wynhamer v. People, 13 N. Y. (1856) 378; People v. Gallagher, 4 Mich. (1856) 244; State v. Wheeler, 25 Conn. (1856) 290.

Some courts avowed that due process protected vested rights. Houston v. Bogle, 32 N. Car. (1849) 496; Menges v. Dentler, 33 Pa. (1859) 495, 75 Am. Dec. 616.

[41] "By law of the land is most clearly intended the general law; a law, which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures in all possible forms, would be the law of the land.

tribunal refused to follow his interpretation, but the Supreme Court of the United States, in so far as an opinion was expressed on this subject,[42] adopted his viewpoint, and if anything carried his definition a step further, distinctly linking up the principles of vested rights with due process of law.[43] In this way the path was prepared for an extension of the meaning of this phrase whenever it should be found necessary to do so.[44]

§ 84. From the point of view of the lawyer, however, there was still much to be desired. Numerous *dicta* of such judges as Story and Chase had left the erroneous impression that the Fifth Amendment to the Federal Constitution was a limitation upon state, as well as upon federal action.[45] To correct this impression Chief Justice Marshall, in the famous case of Barron v. Baltimore, clearly laid down the doctrine that the first ten amendments applied only as restraints on the federal government and did not limit state action.[46] The next year Justice Story declared decisively that the federal courts had "no

"Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void." Dartmouth College v. Woodward, 65 N. H. (1817) 473 at 613, 614. See also the argument of Mr. Smith, *Ibid.*

[42] Justice Story was the only one of the justices of the Supreme Court to consider this point. 4 Wheat. (U. S., 1819) 518 at 705, 4 L. ed. 629.

[43] Story declared that to take the property of this corporation would be the same as taking the property of A and giving it to B for "each trustee has a vested right, and legal interest in his office, and it cannot be divested but by due course of law." 4 Wheat. (U. S., 1819) 518 at 705, 4 L. ed. 629.

[44] See in this regard W. Bird, "Evolution of Due Process of Law in the decisions of the United States Supreme Court," Columbia Law Review, Vol. XIII (Jan., 1913), pp. 38-50. Mr. Bird takes the position that the entire development of the due process has been the attempt of the court to stretch it to cover this common-law doctrine of fundamental and natural rights. The first departures from this he sees in the cases of Lochner v. New York, 198 U. S. (1905) 45, 49 L. ed. 937, and Adair v. United States, 208 U. S. (1908) 161, 52 L. ed. 436.

[45] The decisions which seem to point this way were: Calder v. Bull, 3 Dall. (U. S., 1798) 386, 1 L. ed. 648; Dartmouth College v. Woodward, 4 Wheat. (U. S., 1819) 518, 4 L. ed. 629; Wilkinson v. Leland, 2 Pet. (U. S., 1829) 627, 7 L. ed. 542.

[46] 7 Pet. (U. S., 1833) 243, 8 L. ed. 672. This decision had been somewhat foreshadowed by Jackson ex dem. Wood v. Wood, 2 Cow. (N. Y., 1824) 819, and Satterlee v. Matthewson, 2 Pet. (U. S., 1829) 380, 7 L. ed. 458.

right to pronounce an act of the state legislature void, as contrary to the Constitution of the United States from the mere fact that it divests antecedent vested rights of property."[47] Gradually the state courts swung to this position,[48] which was consistently followed by the federal courts, making the doctrine well settled by the time of the adoption of the Fourteenth Amendment.[49]

§ 85. The first authoritative interpretation of the due process provision of the Fifth Amendment was not made until more than a half century after its adoption. In many respects the case of Murray v. Hoboken Land and Improvement Company (1855)[50] shows the influence of the position taken by the state courts a few decades before. The problem involved was both difficult and important, and it aroused no small amount of interest particularly among the legal profession. Although the court upheld the summary procedure employed in the collection of debts owed to the government, it was, at the same time, careful to point out that Congress did not have absolute control over such matters. At the very first of his opinion Justice Curtis declared, "The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and can not be so construed as to leave Congress free to make any process 'due process of law' by its mere will."[51] Having thus forestalled any possible misinterpretation of his opinion, he proceeded to uphold the procedure prescribed by Congress on entirely different grounds.

This *dictum* came to be generally accepted as an accu-

[47] Watson v. Mercer, 8 Pet. (U. S., 1834) 88, 8 L. ed. 876. An act of the Pennsylvania legislature had cured certain defects in land titles. Justice Story held that this law violated neither the *ex post facto* nor the obligation of contracts clause and hence was within the power of the state to enact. See also Bennett v. Boggs, 1 Baldw. (U. S., 1830) 60, Fed. Cas. No. 1319.

[48] Butler v. Palmer, 1 Hill (N. Y., 1841) 324; State v. Wheeler, 25 Conn. (1856) 290; People v. Gallagher, 4 Mich. (1856) 244.

[49] Fox v. Ohio, 5 How. (U. S., 1846) 410 at 434, 12 L. ed. 213; Withers v. Buckley, 20 How. (U. S., 1857) 84, 15 L. ed. 816. For cases on this point since 1868 see ch. I, sec. 8, n. 18.

[50] Murray v. Hoboken Land & Imp. Co., 18 How. (U. S., 1855) 272, 15 L. ed. 372. The case is more fully discussed in sec. 94.

[51] *Ibid.*, p. 276.

rate statement of the view of the court. The matter was regarded as settled and no one doubted that Congress was prohibited from making any process "due process." Nevertheless, but few cases involving this clause were presented to the court, and it was not until 1886 that an Act of Congress was declared void as violating the Fifth Amendment. Down till 1924 but four acts of Congress were declared unconstitutional because they were repugnant to that section of the constitution.[52] In three of these, however, the decision rested quite as much on other grounds as on the conflict with the due process provision. One case involved self-incrimination,[53] another the power of congress over interstate commerce,[54] and the third the Sixth Amendment.[55] In the last two of these decisions the court indicated that the due process clause was a limitation on Congress but none of the statements of the justices in this regard can be said to more than *dicta*. The first decision, therefore, to rest squarely upon this protection as a limitation on Congress was rendered in the Minimum Wage Case in 1923.[56] Justice Sutherland, in his opinion in that case, did not raise the question of due process as a legislative restriction. That was taken for granted on the basis that the Fourteenth Amendment was a restriction on the state legislatures. Without such an assumption, however, the court could hardly have declared void the minimum wage legislation for the District of Columbia.

§ 86. Many more cases arose under the Fourteenth Amendment. Since 1872 hardly a year has passed in which at least one case involving that part of the constitution was not decided.[57] The vast majority of these decisions

[52] The inferior federal courts had declared acts void because opposed to this section several years before. This received the tacit assent of the Supreme Court. See *post* sec. 107.

[53] Boyd v. United States, 116 U. S. (1886) 616, 29 L. ed. 746.

[54] Adair v. United States, 208 U. S. (1908) 161, 52 L. ed. 436.

[55] United States v. Cohen Grocery Co., 255 U. S. (1921) 81, 65 L. ed. 516; Weeds v. United States, 255 U. S. (1921) 109, 65 L. ed. 537. I have considered these two cases as one because the essential facts and the statute involved were the same in each case.

[56] Adkins v. Children's Hospital, 261 U. S. 525, 67 L. ed. 785.

[57] The Slaughter House Cases, 16 Wall. (U. S., 1872) 36, 21 L. ed.

involved the due process provision. The early opinions frequently contained *dicta* to the effect that the due process provision was a limitation on the state legislatures, and a study of these statements shows that many members of the court approved of them.[58] But the court was very reluctant to apply the new protection. Thirty cases were presented involving the validity of state statutes under the due process provision before one was found in which the legislation was considered sufficiently arbitrary to violate it.[59] It is important to note, however, that although the

394, were the first in which the meaning of this phrase was involved. Cases involving the Fourteenth Amendment have arisen at every term of the court except the one beginning in 1878. The case in the term beginning 1880 involved other portions of the Amendment than the due process provision. At every other term due process of law has been before the court.

[58] Thus Justice Miller intimated as much in his opinion in Bartemeyer v. Iowa, 18 Wall. (U. S., 1873) 129, 21 L. ed. 929. Justice Field stated the matter very strongly in his concurring opinion. "The right of property in an article involves the power to sell and dispose of such article as well as to use and enjoy it. Any act which declares that the owner shall neither sell it nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law. Against such arbitrary legislation by any state the Fourteenth Amendment affords protection." Page 137. He agreed, however, that the prohibiting of the sale of liquor was a valid police measure. See also the concurring opinion of Justice Bradley.

In Munn v. Illinois, 94 U. S. (1876) 113, 24 L. ed. 77, Chief Justice Waite called due process, "a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the states." Page 124. The entire argument of Justice Field was to this effect. See also his opinion in Barbier v. Connolly, 113 U. S. (1884) 27, 28 L. ed. 923.

A similar viewpoint was expressed by Justice Miller in Davidson v. New Orleans, 96 U. S. (1877) 97 at p. 102, 24 L. ed. 616. See also the opinion of Bradley (p. 107) who claimed that Miller had restricted the meaning of due process to too narrow a scope.

[59] In Yick Wo v. Hopkins, 118 U. S. (1886) 356, 30 L. ed. 220, an ordinance of the city of San Francisco was declared to violate due process of law and the same year a California tax arrangement was declared void under this provision. Santa Clara v. Southern Pac. R. Co., 118 U. S. (1886) 394, 30 L. ed. 118. The cases involving due process of law in which a state statute or procedure had been upheld are as follows: Slaughter House Cases, 16 Wall. (U. S., 1872) 36, 21 L. ed. 394; Bradwell v. Illinois, 16 Wall. (U. S., 1872) 130, 21 L. ed. 442; Bartemeyer v. Iowa, 18 Wall. (U. S., 1872) 129, 21 L. ed. 929; Minor v. Happersett, 21 Wall. (U. S., 1874) 162, 22 L. ed. 627; Walker v. Sauvinet, 92 U. S. (1875) 90, 23 L. ed. 678; Kennard v. Louisiana, 92 U. S. (1875) 480, 23 L. ed. 478; State Railroad Tax Cases, 92 U. S. (1875) 575, 23 L. ed. 663; Munn v. Illinois, 94 U. S. (1876) 113, 24 L. ed. 77; McMillen v. Anderson, 95 U. S. (1877) 37, 24 L. ed. 335; Pearson v. Yewdall, 95 U. S. (1877) 294, 24 L. ed. 436; Davidson v. New Orleans, 96 U. S. (1877) 97, 24 L. ed. 616; Railroad Co. v. Richmond, 96 U. S. (1877) 521, 24 L. ed. 734; Strauder v. West

court consistently upheld state legislation for nearly thirty years, at no time was it suggested that the legislature was free from the restraint of due process of law.[60]

It is evident that the federal courts, like those in the states, has almost an uncanny intuition for the role which the provision from Magna Carta was to play in subsequent constitutional development. With remarkable accord they steered clear of the pitfalls which would have led them to restrict its application to judicial or executive procedure.[61] It is very evident from the opinions that they had no real knowledge of the direction in which the concept was developing, but the technique of the judicial decision, the concrete problems of applying the law in the cases before them charted the course for them. Had the courts not been restrained by their natural inhibitions to deciding more than the case before them, we might have had an entirely different result. With contrary decisions in these early cases it would have been impossible for the courts to build the superstructure which was to rear itself about this protection during the last half of the century.

Virginia, 100 U. S. (1879) 303, 25 L. ed. 664; Kirtland v. Hotchkiss, 100 U. S. (1879) 491, 25 L. ed. 558; Missouri v. Lewis, 101 U. S. (1879) 22; 25 L. ed. 989; Kelly v. Pittsburg, 104 U. S. (1881) 78, 26 L. ed. 659; Gross v. United States Mtg. Co., 108 U. S. (1882) 477, 27 L. ed. 795; Louisiana v. Mayor of New Orleans, 109 U. S. (1883) 285, 27 L. ed. 936; Hurtado v. California, 110 U. S. (1883) 516, 28 L. ed. 232; Santa Cruz Co. v. Santa Cruz R. Co., 111 U. S. (1883) 361, 28 L. ed. 456; Hagar v. Reclamation Dist. No. 108, 111 U. S. (1883) 701, 28 L. ed. 569; Head v. Amoskeag Mfg. Co., 113 U. S. (1884) 9, 28 L. ed. 889; Barbier v. Connolly, 113 U. S. (1884) 27, 28 L. ed. 923; Provident Institution v. Mayor of Jersey City, 113 U. S. (1884) 506, 28 L. ed. 1102; Soon Hing v. Crowley, 113 U. S. (1884) 703, 28 L. ed. 1145; Wurts v. Hoagland, 114 U. S. (1884) 607, 29 L. ed. 229; Kentucky Railroad Tax Cases, 115 U. S. (1885) 321, 29 L. ed. 414; Missouri Pac. R. Co. v. Humes, 115 U. S. (1885) 512, 29 L. ed. 463; Campbell v. Holt, 115 U. S. (1885) 620, 29 L. ed. 483; Presser v. Illinois, 116 U. S. (1885) 252, 29 L. ed. 615.

[60] Chief Justice Waite's language in Walker v. Sauvinet, 92 U. S. (1875) 90, 23 L. ed. 678, is not quite clear in this regard and might be taken to mean that due process did not restrict the state legislatures. He took particular pains, therefore, to state the situation more clearly the year following in Munn v. Illinois, 94 U. S. (1876) 113 at p. 124, 24 L. ed. 77.

[61] That due process had a very broad connotation in the early years of judicial decisions in this country may be seen by contrasting State v. Hobbs, 2 Tyler (Vt., 1803) 380, with Twining v. New Jersey, 211 U. S. (1908) 78, 53 L. ed. 97. The earlier case held due process to include a protection against self-incrimination; the latter held that it did not include such a protection.

CHAPTER XIII.

NOTICE AND HEARING.

§ 87. The requirement of notice and hearing as a part of due process of law was a natural corollary of the idea that that phrase embodied the essential principles of the common law of England. The very close relationship between due process and the procedure at common law was stressed in opinion after opinion. This was but natural in view of the background of the early state courts, and the fact that the colonial courts had consistently proceeded according to it.[1] One of the most cherished features of common-law procedure, as the colonists understood it, was the right of trial by jury. This device was quite naturally considered by many to be one of the elements of common-law procedure according to due process of law. It is not surprising, therefore, to find numerous *dicta*, during the first half century of state decisions, to the effect that a jury trial is a part of the law of the land which is secured to all citizens.

One of the earliest decisions involving due process declared that it secured a trial by jury,[2] and until the middle of the nineteenth century, some of the state courts and occasionally the federal courts rendered similar opinions.[3] It soon became evident, however, that there were numer-

[1] P. S. Reinsch, English Common Law in the American Colonies (Madison, 1899).

[2] Bowman v. Middleton, 1 Bay (S. Car., 1792) 252.

[3] Bank of Columbia v. Okely, 4 Wheat. (U. S., 1819) 235 at 244, 4 L. ed. 559; Greene v. Briggs, 1 Curt. (U. S., 1852) 311; Zylstra v. Charleston, 1 Bay (S. Car., 1794) 382; Trustees of the University v. Foy, 1 Murphy (N. Car., 1805) 58, 3 Am. Dec. 672; Ely v. Thompson, 10 Ky. (1820) 70; Harding v. Goodlett, 3 Yerg. (Tenn., 1832) 41, 24 Am. Dec. 546; Saco v. Wentworth, 37 Maine (1853) 165; Felter v. Wilt, 46 Pa. St. (1864) 457; Cf. Polk v. State, 224 Pac. (Okla. Cr. 1924) 194.

ous situations in which a jury trial was not applicable. Consequently the courts found it necessary to pare down their original *dicta* to meet these new cases as they arose. As early as 1805 the South Carolina court declared that due process did not necessitate a jury trial in petit cases,[4] and the other courts quite generally followed its reasoning.[5] The decision of the New York court to the effect that a jury trial was not necessary to due process in contempt cases was also widely followed.[6] In other cases of a specialized nature a similar rule was laid down.[7] A large

[4] But the legislature can not take away trial by jury when it is well established as the recognized procedure. White v. Kendrick, 1 Brev. (S. Car., 1805) 469. See also Enderman v. Ashby, 2 Ky. (1801) 53.

[5] Adeline G. Nott's Case, 11 Maine (1834) 208; State v. Maxcy, 1 McMul. (S. Car., 1837) 501; In re Powers, 25 Vt. (1853) 261; State v. Conlin, 27 Vt. (1855) 318; In re Dougherty, 27 Vt. (1855) 325; State v. Freeman, 27 Vt. (1855) 523; Byers v. Commonwealth, 42 Pa. (1862) 89; Norton v. McLeary, 8 Ohio St. (1858) 205; Dawson v. Horan, 51 Barb. (N. Y. 1868) 459; Thomas v. Bibb, 44 Ala. (1870) 721; Cosgriff v. Craig, 195 N. Y. (1909) 190, 88 N. E. 38; Ex parte Doza, 13 Okla. Cr. (1917) 287, 164 Pac. 130; State v. Hirsch, 91 Vt. (1917) 330, 100 Atl. 877; Schadt Motor Truck Co. v. Dengenhart, 10 Ohio App. (1921) 100.

[6] Darby's Case, 3 Wheeler Cr. Cas. (N. Y., 1824) 1; State v. Woodfin, 27 N. Car. (1844) 199, 42 Am. Dec. 161; People v. Turner, 1 Cal. (1850) 152; Wyatt v. People, 17 Colo. (1892) 252, 28 Pac. 961; In re Terry, 128 U. S. (1888) 289, 32 L. ed. 405; Cooke v. United States, 267 U. S. (1925) 517, 69 L. ed. 767; State v. Zimmerman, 148 N. E. (Ill., 1925) 5; Eagan v. Lynch, 3 Civ. Proc. (N. Y., 1883) 236; Manderscheid v. Plymouth Co. Dist. Ct., 69 Iowa (1886) 240, 28 N. W. 551; Eilenbecker v. Plymouth Co. Dist. Ct., 134 U. S. (1890) 31 at 39, 33 L. ed. 801; State v. Durein, 46 Kans. (1891) 695, 27 Pac. 148; State v. Mitchell, 3 S. Dak. (1892) 223, 52 N. W. 1052; Kingsbery v. Ryan, 92 Ga. (1893) 108, 17 S. E. 689; Interstate Commerce Commn. v. Brimson, 154 U. S. (1894) 447 at 489, 38 L. ed. 1047; Ex parte Boyce, 41 S. Car. (1894) 201; State v. Markuson, 5 N. Dak. (1895) 147, 64 N. W. 934; People v. Leubischer, 34 App. Div. (1898) 577, 54 N. Y. S. 869; State v. Shepard, 177 Mo. (1903) 205, 76 S. W. 79; Rothschild v. Steger Piano Co., 256 Ill. (1912) 196, 99 N. E. 920; State v. Sides, 95 Kans. (1915) 633, 148 Pac. 624; Wood v. Wood, 70 Okla. (1918) 244, 174 Pac. 269; State v. Finlayson, 41 N. Dak. (1919) 494, 170 N. W. 910; Lewinsohn v. United States, 278 Fed. (1922) 421; McGibbony v. Mancaster, 286 Fed. (1923) 129; People v. Kowalski, 307 Ill. (1923) 378, 138 N. E. 634; Taliaferro v. United States, 290 Fed. (1923) 906; Michaelson v. United States, 291 Fed. (1923) 940; Barrett v. United States, 288 Fed. (1923) 815; Patton v. United States, 288 Fed. (1923) 812; Sandefur v. Canoe Creek Coal Co., 293 Fed. (1924) 379; In re Barrett, 202 N. Y. S. (1924) 20; Lucia v. Utterback, 197 Iowa (1924) 1181, 198 N. W. 626. Of course, a notice and hearing is necessary in contempt cases. See Ex parte Stricker, 109 Fed. (1901) 145.

[7] If the determination is not criminal in nature a jury trial has been held unnecessary to due process. E. g., arrest and confinement of diseased

number of the cases involving the right of trial by jury did not involve the due process section of the Constitution

persons (Cooper v. Schultz, 32 How. Pr. (N. Y., 1866) 107), paupers (Adeline G. Nott's Case, 11 Maine (1834) 208), inebriates (In re Powers, 25 Vt. (1853) 261); or delinquent children (In re Sharp, 15 Idaho (1908) 120, 96 Pac. 563).

Summary judgments on bonds have been upheld (Murray's Admr. v. Alston, 1 Mill Const. (S. Car., 1817) 128; Janes v. Reynolds, 2 Tex. (1847) 250), as have bastardy proceedings without a jury. (Goddard v. State, 10 Tenn. (1825) 96). See also the specialized cases in Banning v. Taylor, 24 Pa. St. (1855) 289; Matter of Empire City Bank, 18 N. Y. (1858) 199, 8 Abb. Pr. 192; Rice v. Parkman, 16 Mass. (1820) 326; Light v. Canadian County Bank, 2 Okla. (1894) 543 at 551, 37 Pac. 1075; Gregory v. Hecke, 238 Pac. (Cal. App., 1925) 787.

Recent cases illustrating the same general rule are: *Probate cases:* In re Dolbeer's Est., 153 Cal. (1908) 652, 96 Pac. 266; In re Edmond's Est., 154 Ill. App. (1910) 367; Crawfordsville Trust Co. v. Ramsey, 178 Ind. (1912) 258, 98 N. E. 177; Pons v. Pons, 132 La. (1913) 370, 61 So. 406; In re Land's Est., 166 Cal. (1914) 538, 137 Pac. 246; In re Fox's Est., 166 App. Div. (1915) 718, 152 N. Y. S. 431; Wadsworth v. Hinchcliff, 163 App. Div. (1916) 266, 148 N. Y. S. 798, 218 N. Y. 589, 113 N. E. 488; Parker v. Hamilton, 49 Okla. (1917) 693, 154 Pac. 65; In re Eno's Will, 94 Misc. (1917) 100, 157 N. Y. S. 553; In re White, 100 Misc. (1918) 56, 166 N. Y. S. 158; Williams v. Bailey, 177 N. Car. (1919) 37, 97 S. E. 721; In re Woodward, 105 Misc. (1919) 446, 173 N. Y. S. 556; Stratton v. Rice, 66 Colo. (1919) 407, 181 Pac. 529; Pedersen v. Moore, 32 Idaho (1920) 420, 184 Pac. 475; In re Hayhurst's Est., 215 Ill. App. (1921) 315; Fuller v. Sylvia, 240 Mass. (1922) 49, 133 N. E. 384; In re Price's Est., 119 Misc. (1923) 19, 194 N. Y. S. 842; Miller v. O'Brien, 75 Colo. (1924) 117, 223 Pac. 1088; In re Hanna's Will, 121 Misc. (1924) 754, 202 N. Y. S. 42.

Administration of Estates: Hildebrand v. Kinney, 172 Ind. (1909) 447, 87 N. E. 832; In re McNamara's Est., 166 Mich. (1911) 451, 132 N. W. 86; Morton v. Robinson, 256 Ill. (1912) 629, 100 N. E. 200; Trego v. Cunningham's Est., 267 Ill. (1915) 367, 108 N. E. 350; In re Reinhardt's Will, 92 Misc. (1915) 96, 156 N. Y. S. 171; In re McCormick's Est., 72 Ore. (1914) 608, 143 Pac. 915, 144 Pac. 425; Farnsworth v. Hatch, 47 Utah (1915) 62, 151 Pac. 537; In re Baird's Est., 173 Cal. (1918) 617, 160 Pac. 1078; In re Griffith, 103 Misc. (1918) 562, 170 N. Y. S. 629; Chipman v. Perdue, 135 Ark. (1918) 559, 205 S. W. 892; In re Stark's Est., 118 Misc. (1922) 240, 193 N. Y. S. 231; In re Stein's Est., 200 App. Div. (1922) 726, 193 N. Y. S. 298; In re Thompson's Est., 204 App. Div. (1923) 182, 198 N. Y. S. 374; In re Meadow's Will, 185 N. Car. (1923) 99, 116 S. E. 257; In re McLure's Est., 68 Mont. (1924) 556, 220 Pac. 527; Cafiero v. Cafiero, 154 La. (1924) 1076, 98 So. 672; In re Beare's Est., 122 Misc. (1924) 519, 203 N. Y. S. 483; Zackheim v. Zackheim, 75 Colo. (1924) 161, 225 Pac. 268.

Guardianship: Dallas County v. Thornley, 140 Iowa (1908) 355, 118 N. W. 530; Ferguson v. Ferguson, 128 S. W. (Tex. Civ. App., 1910) 632; Holly v. Holly, 157 Iowa (1912) 584, 138 N. W. 445; In re McLaughlin, 87 N. J. Eq. (1918) 138, 102 Atl. 439; In re Bundy's Est., 44 Cal. App. (1920) 466, 186 Pac. 811; In re Daedler, 194 Cal. (1925) 320, 228 Pac. 467.

Bankruptcy and Insolvency: In re Wood, 210 U. S. (1908) 246, 52 L. ed. 1046; Werner v. Mohawk Condensed Milk Co., 152 App. Div. (1912) 330, 136 N. Y. S. 585; Lipscomb v. Bank of Tatum, 120 S. Car. (1922) 147, 112 S. E. 827; In re Marschall, 287 Fed. (1923) 187.

because most of the states had protected that right by other specific provisions.[8] If a statute were valid under

Military Court Martial: Rawson v. Brown, 18 Maine (1841) 216; Ex parte Milligan, 4 Wall. (U. S., 1866) 2, 18 L. ed. 281; Ex parte Jochen, 257 Fed. (1919) 200; In re Jones, 71 W. Va. (1913) 567, 77 S. E. 1029; Kahn v. Anderson, 255 U. S. (1921) 1, 65 L. ed. 469; Ex parte Reed, 100 U. S. (1879) 21, 25 L. ed. 538; Kurtz v. Moffitt, 115 U. S. (1885) 487, 500, 29 L. ed. 458.

Habeas Corpus: Pittman v. Byars, 51 Tex. Civ. App. (1908) 83, 112 S. W. 102; People ex rel. v. Grifenhagen, 154 N. Y. S. (1915) 965; Foster v. Foster, 230 S. W. (Tex. Civ. App., 1920) 1064; Ex parte Crowley, 268 Fed. (1920) 1016; Case of Graves, 236 Mass. (1921) 493, 128 N. E. 867; In re Courtin, 150 La. (1922) 624, 91 So. 67; In re Taylor, 12 Chicago Leg. N. (1879) 17; Fed. Cas. No. 13,774.

In *eminent domain cases* the rule is that even though a jury trial is required before a valuation may be set for the property, such a procedure is not necessary to determine the necessity of the condemnation. United States v. Jones, 109 U. S. (1883) 513, 27 L. ed. 1015; United States v. Engerman, 46 Fed. (1891) 176; Baltimore Trac. Co. v. Baltimore Belt R. Co., 151 U. S. (1894) 137, 38 L. ed. 102; High Bridge Lumber Co. v. United States, 69 Fed. (1895) 320 at 325; Bauman v. Ross, 167 U. S. (1897) 548, 593, 42 L. ed. 270; North Laramie Land Co. v. Hoffman, 268 U. S. (1925) 276, 69 L. ed. 953; St. Louis &c. R. Co. v. Pfau, 212 Mo. (1908) 398, 111 S. W. 10; Portneuf Irrig. Co. v. Budge, 16 Idaho (1909) 116, 100 Pac. 1046; Chicago &c. R. Co. v. Miller, 251 Ill. (1911) 58, 95 N. E. 1027; In re Jackson Street, 62 Wash. (1911) 432, 113 Pac. 1112; Edwards v. Cheyenne, 19 Wyo. (1911) 110, 114 Pac. 677, 122 Pac. 900; United States v. Beaty, 232 U. S. (1913) 463, 58 L. ed. 686; Louisville &c. R. Co. v. Western Union Tel. Co., 207 Fed. (1913) 1; Wilcox v. Engebretsen, 160 Cal. (1913) 288, 116 Pac. 750; Hyattsville v. Washington W. &c. R. Co., 122 Md. (1914) 660, 90 Atl. 515; Riverside Drainage Dist. v. Buckner, 108 Miss. (1914) 427, 66 So. 784; Lake Bowling Alley v. Richmond, 116 Va. (1914) 429, 82 S. E. 97; Vallejo &c. R. Co. v. Reed Orchard Co., 169 Cal. (1915) 545, 147 Pac. 238; Cuyahoga River Power Co. v. Akron, 240 U. S. (1916) 462, 60 L. ed. 743; Young v. Red Fork Levee Dist., 124 Ark. (1916) 61, 186 S. W. 604; Ketchum Coal Co. v. Carbon County, 48 Utah (1917) 342, 159 Pac. 737; Dallas v. Atkins, 197 S. W. (Tex. Civ. App., 1917) 593; Filbin Corp. v. United States, 265 Fed. (1920) 354; Thorne v. Clarksburg, 88 W. Va. (1921) 251, 106 S. E. 644; Filbin Corp. v. United States, 266 Fed. (1920) 911; Brown v. County State Road & Bridge Commn., 182 Wis. (1924) 480, 196 N. W. 860; White v. Charleston, 98 W. Va. (1925) 143, 126 S. E. 705; Landell v. State, 128 Atl. (N. J. Sup., 1925) 380. See also sec. 88, n. 20.

In *admiralty cases* trial by jury has never been recognized. United States v. La Vengeance, 3 Dall. (U. S., 1796) 297, 1 L. ed. 610; Whelan v. United States, 7 Cranch (U. S., 1812) 112, 3 L. ed. 286; The Sarah, 8 Wheat. (U. S., 1923) 391, 5 L. ed. 644.

[8] See, for example, Thompson v. Floyd, 47 N. Car. (1855) 313; Charles River Bridge v. Warren Bridge, 23 Mass. (6 Pick., 1829) 376; Boring v. Williams, 17 Ala. (1850) 510; Davis v. State, 35 Tex. (1872) 118; Smith v. State, 9 Tenn. (1829) 228; Ewing v. Filley, 43 Pa. (1862) 384; Scantland v. Commonwealth, 29 Ky. (6 J. J. Marsh, 1831) 585; Ex parte Crouse, 4 Whart. (Pa., 1839) 9; State v. Almy, 67 N. H. (1892) 274, 28 Atl. 372; Woodworth v. Rogers, Fed. Cas. No. 18,018 (1847); Clark v.

the more explicit provision, it would certainly be upheld under the more general.[9]

Although these decisions considerably weakened the earlier view that due process included trial by jury, many of the legal profession were unconvinced. Case after case was presented to the court involving this point, only to meet with the answer that in many types of cases other forms of trial were equally due process.[10] After the middle of the century, the federal courts took a very decided stand on this question. Since that time no one can doubt that due process does not require a jury trial if one would be inappropriate.[11] Indeed, the United States Supreme Court has gone so far as to declare that a state could abolish this form of procedure altogether and still not violate the Fourteenth Amendment.[12] In every case where this

United States, Fed. Cas. No. 2837 (1811); Bains v. The James & Catherine, Fed. Cas. No. 756 (1832); United States v. Scott, Fed. Cas. No. 16,240b (1851).

[9] See particularly Commissioners v. Seabrook, 2 Strob. (S. Car., 1848) 560.

[10] See the long list of cases cited in 12 Corpus Juris, 1207, 1208, n. 45.

[11] Perhaps one of the best statements is that of Justice Bradley, "It is a mistaken idea that due process of law requires a plenary suit and a trial by jury, in all cases where property or personal rights are involved. The important right of personal liberty is generally determined by a single judge, on a writ of habeas corpus, using affidavits or depositions for proofs, where facts are to be established. Assessments for damages and benefits occasioned by public improvements are usually made by commissioners in a summary way. Conflicting claims of creditors, amounting to thousands of dollars, are often settled by the courts on affidavits or depositions alone. And the courts of chancery, bankruptcy, probate, and admiralty administer immense fields of jurisdiction without trial by jury. In all cases that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usage of the courts." Ex parte Wall, 107 U. S. (1882) 265 at 289, 27 L. ed. 552.

See also: In re Meador, Fed. Cas. (D. C., 1869) No. 9375, 1 Abb. U. S. 317; In re Sing Lee, 54 Fed. (1893) 334; Ex parte Brown, 140 Fed. (1905) 461; Ex parte Januszewski, 196 Fed. (1911) 123; Walker v. Sauvinet, 92 U. S. (1874) 90, 23 L. ed. 678; Eilenbecker v. Plymouth County, 134 U. S. (1890) 31; 33 L. ed. 801; Hallinger v. Davis, 146 U. S. (1892) 314, 36 L. ed. 986; Maxwell v. Dow, 176 U. S. (1900) 581, 44 L. ed. 597; French v. Barber Asphalt Pav. Co., 181 U. S. (1901) 324, 45 L. ed. 879; Lovato v. New Mexico, 242 U. S. (1916) 199, 61 L. ed. 244; Kahn v. Anderson, 255 U. S. (1921) 1, 65 L. ed. 469; Chappell Chemical Co. v. Sulphur Mines Co., 172 U. S. (1899) 472 at 475, 43 L. ed. 520.

[12] "Trial by jury has never been affirmed to be a necessary requisite of due process of law." Justice Peckham in Maxwell v. Dow, 176 U. S. (1900) 581 at 603, 44 L. ed. 597

has been suggested, however, it was only a *dictum,* for no state has as yet seen fit to completely abolish trials by jury. Although it is now generally believed that due process has no relation to that particular form of procedure,[13] and although the courts have upheld numerous and fundamental changes in the jury system,[14] the question has not been authoritatively determined.[15]

"The requirement of due process does not deprive a state of the power to dispense with jury trial altogether." Justice Lurton in Jordan v. Massachusetts, 225 U. S. (1912) 167 at 176, 56 L. ed. 1038.

See also Wagner Elec. Mfg. Co. v. Lyndon, 262 U. S. (1923) 226, 67 L. ed. 961.

[13] See 12 Corpus Juris, 1207, 1208; 16 R. C. L. 201; 6 R. C. L. 458; 7 Standard Proc. 921.

[14] A jury of eight instead of twelve has been upheld. Maxwell v. Dow, 176 U. S. (1900) 581, 44 L. ed. 597. See also State v. Bates, 14 Utah (1896) 293, 47 Pac. 78; Robinson v. Wayne Cir. Judges, 151 Mich. (1908) 315, 115 N. W. 682; In re Wilkins, 7 Okla. Cr. (1911) 422, 115 Pac. 1118; Lindsay v. Lindsay, 257 Ill. (1913) 328; Chesapeake &c. R. Co. v. Carnahan, 118 Va. (1916) 46, 86 S. E. 863; Baader v. State, 201 Ala. (1917) 76, 77 So. 370; Stewart v. Ertel, 69 Ind. App. (1919) 290, 121 N. E. 661; Groves v. Ware, 182 N. Car. (1921) 553, 109 S. E. 568; Lakes v. Goodloe, 195 Ky. (1922) 240, 242 S. W. 632. *Contra:* Antonelli v. State, 6 Okla. Cr. (1911) 157, 117 Pac. 654.

Provisions for a special or a struck jury have been sustained. Patchin v. Sands, 10 Wend. (N. Y., 1833) 510; Brown v. New Jersey, 175 U. S. (1899) 172, 44 L. ed. 119; Bullock v. State, 65 N. J. L. (1900) 557, 47 Atl. 62; People v. Hall, 169 N. Y. (1901) 184, 62 N. E. 170; Southern R. Co. v. Oliver, 102 Va. (1904) 710, 47 S. E. 862; Jerome v. New York E. J. P. Co., 124 App. Div. (1908) 372, 108 N. Y. S. 801; People v. McClellan, 124 App. Div. (1908) 664, 109 N. Y. S. 76; Coler v. Brooklyn Daily Eagle, 133 App. Div. (1909) 300, 117 N. Y. S. 273, 133 App. Div. (1909) 934, 118 N. Y. S. 110; In re Eno's Est., 202 App. Div. (1922) 739, 194 N. Y. S. 931.

Other material changes in the composition of the jury have been upheld. Thus a jury need not be drawn from all the citizens of the district. Rawlins v. Georgia, 201 U. S. (1906) 638, 50 L. ed. 899. See also on the same general topic, Walker v. Sauvinet, 92 U. S. (1875) 90, 23 L. ed. 678; Frank v. Mangum, 237 U. S. (1915) 309, 59 L. ed. 969; Lovato v. New Mexico, 242 U. S. (1916) 199, 61 L. ed. 244; Welborne v. Donaldson, 115 Ga. (1902) 563, 41 S. E. 999; State v. Bates, 14 Utah (1896) 293, 47 Pac. 78; State v. Thompson, 15 Utah (1897) 488, 50 Pac. 409; In re McKee, 19 Utah (1899) 231, 57 Pac. 23; Miller v. O'Brien, 75 Colo. (1924) 117, 223 Pac. 1088.

As to changes in the powers of the jury see Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Assn., 271 S. W. (Ky., 1925) 695.

[15] See Howard v. State, 80 Tex. Civ. App. (1917) 588; Cotton v. State, 85 Fla. (1923) 197, 95 So. 668.

Due process may require jury trial in those cases for which it was provided before the adoption of the Constitution. Dabbs v. Hernken, 3 Rob. (La., 1842) 123; Lake Erie, W. &c. R. Co. v. Heath, 9 Ind. (1857)

§ 88. If a trial by jury was not to be considered a requisite of due process of law, just what procedure would satisfy that requirement? During the third and fourth decades of the nineteenth century the courts answered that at least a regular trial before some judicial body was necessary.[16] This view became very prevalent and persisted well past the middle of the century. A reflection of it may be seen in the decisions of the United States Supreme Court in the Confiscation Acts Cases (1870).[17] But even this test of due process did not prove entirely satisfactory, for the mere fact that judgment came from a court of law was no inherent guarantee that the essential elements of justice and reasonableness had been adhered to in the trial.[18] Furthermore, it was evident that there were certain kinds of decisions that could not be made by a regular judicial body although they may have vitally affected private rights.[19] When it became evident that such bodies

558; Whitehurst v. Coleen, 53 Ill. (1870) 247; Light v. Canadian County Bank, 2 Okla. (1894) 543 at 551, 37 Pac. 1075; Tomlinson v. Bainaka, 163 Ind. (1904) 112, 70 N. E. 155; Carlson v. Sullivan, 146 Fed. (1906) 476; Parham v. Potts-Thompson Liquor Co., 127 Ga. (1907) 303, 56 S. E. 460; State v. Gibbes, 109 S. Car. (1918) 135, 95 S. E. 346; State v. Kelly, 57 Mont. (1920) 123, 187 Pac. 637; Best v. Barnwell County, 114 S. Car. (1920) 123, 103 S. E. 479; Bowman v. Virginia State Entomologist, 128 Va. (1921) 351, 105 S. E. 141; Liberty Oil Co. v. Condon Nat. Bank, 260 U. S. (1923) 235, 67 L. ed. 232; Sharum v. Meriwether, 156 Ark. (1923) 331, 246 S. W. 501; State v. Parker, 87 Fla. (1924) 181, 100 So. 260; Mirich v. Forschner Contr. Co., 312 Ill. (1924) 343, 143 N. E. 846; Bull v. Butte Elec. R. Co., 69 Mont. (1924) 529, 223 Pac. 514; Southern R. Co. v. Durham, 266 U. S. (1924) 178, 69 L. ed. 231; State ex rel. v. Kearns, 304 Mo. (1924) 685, 264 S. W. 775.

[16] It has been enunciated as early as 1817 in the argument of Mason, the counsel for the plaintiff, in the Dartmouth College v. Woodward, 65 N. H. (1817) 473. It is reflected in the decisions of a considerable number of courts. Ely v. Thompson, 10 Ky. (1820) 70; State v. Heyward, 3 Rich. (S. Car., 1832) 389; Matter of John and Cherry Street, 19 Wend. (N. Y., 1839) 659; State v. Simons, 2 Speers (S. Car., 1844) 761 at 767; Brown v. Hummel, 6 Pa. (1847) 86, 47 Am. Dec. 431; Arrowsmith v. Burlingim, 1 Fed. Cas. (1848) 1187; White v. White, 5 Barb. (N. Y., 1849) 474; Wynehamer v. People, 13 N. Y. (1856) 378; Newland v. Marsh, 19 Ill. (1857) 376; Huber v. Reily, 53 Pa. (1866) 112.

[17] Miller v. United States, 11 Wall. (U. S., 1870) 268, 20 L. ed. 135; Tyler v. Defrees, 11 Wall. (U. S., 1870) 331, 20 L. ed. 161. The same doctrine was applied in the recent case of People v. Max, 70 Colo. (1921) 100, 198 Pac. 150.

[18] See In re Janes, 30 How. Pr. (N. Y., 1866) 446.

[19] "It not infrequently happens that a full discharge of their duties

as road commissions often exercise tremendous power through their decisions, the weakness of the criterion became evident.[20] The courts, as a result of this type of case, again searched through the common-law decisions and arrived at the conclusion that "due process is not necessarily judicial process."[21] By this time it was evident

compels boards or officers of a purely ministerial character to consider and determine questions of a legal nature. Due process is not necessarily judicial process." Reetz v. Michigan, 188 U. S. (1903) 505 at 507, 47 L. ed. 563.

[20] Pocopson Road, 16 Pa. (1857) 15; Powell v. Sammons, 31 Ala. (1858) 552; People ex rel. v. Smith, 21 N. Y. (1860) 595; Commonwealth v. Painter, 10 Barr. (Pa., 1849) 214; Jackson v. Griswold, 5 Johns. (N. Y., 1809) 139; Rison v. Farr, 24 Ark. (1865) 161, 87 Am. Dec. 52. In People ex rel. v. Smith, 21 N. Y. (1860) 595, the court got around the difficulty by the simple expedient of declaring that due process has no relation to eminent domain. This had been also affirmed by Chief Justice Nelson (dissenting) in Taylor v. Porter, 4 Hill (N. Y., 1843) 140, and Chancellor Kent in Gardner v. Newburgh, 2 Johns. (N. Y., 1816) 162, 7 Am. Dec. 526. See also secs. 164, 165, n. 11, 12.

[21] Reetz v. Michigan, 188 U. S. (1903) 505, 47 L. ed. 563; Weimer v. Bunbury, 30 Mich. (1874) 201 at 211; Bushnell v. Leland, 164 U. S. (1897) 684, 41 L. ed. 598; Public Clearing House v. Coyne, 194 U. S. (1903) 497, 48 L. ed. 1092; United States v. Ju Toy, 198 U. S. (1905) 253, 49 L. ed. 1040; Dukick v. Blair, 3 Fed. (2d) (1925) 302; State ex rel. v. North, 304 Mo. (1924) 607, 264 S. W. 678; State v. Ross, 228 Pac. (Wyo., 1924) 636.

Administrative process has often been held to be due process. See in addition to the cases just cited and those *post*, the following: Bringard v. Stillwagen, 41 Mich. (1879) 54, 1 N. W. 909; Attorney General v. Jochim, 99 Mich. (1894) 358, 58 N. W. 611; Deems v. Baltimore, 80 Md. (1894) 164, 30 Atl. 648; State v. Knowles, 90 Md. (1896) 646, 45 Atl. 877; Caldwell v. Wilson, 121 N. Car. (1897) 425, 28 S. E. 554, 61 Am. St. 672; Riverside &c. R. Co. v. Riverside, 118 Fed. (1900) 736; State Board of Health v. Roy, 22 R. I. (1901) 538, 48 Atl. 802; Lowrey v. Central Falls, 23 R. I. (1901) 354, 50 Atl. 639; Hopkins v. Fachant, 130 Fed. (1904) 839; United States v. Sing Tuck, 194 U. S. (1904) 161, 48 L. ed. 917; Zevely v. Weimer, 5 Ind. Terr. (1905) 646, 82 S. W. 941; In re Bump's Est., 152 Cal. (1907) 16, 92 Pac. 645; Wulzen v. San Francisco, 101 Cal. (1894) 15, 35 Pac. 353; Pearson v. Zehr, 138 Ill. (1891) 48, 29 N. E. 854; Windsor v. State, 103 Md. (1906) 611, 64 Atl. 288; People ex rel. v. Vandecarr, 175 N. Y. (1903) 440, 67 N. E. 913, 199 U. S. 552, 50 L. ed. 305; Harbison v. Knoxville Iron Co., 103 Tenn. (1899) 421, 53 S. W. 955; Moore v. Heany, 34 App. D. C. (1909) 31; Belleville v. St. Clair County Tpk. Co., 243 Ill. (1908) 428; In re Fenton, 58 Misc. 303, 109 N. Y. S. (1908) 321; Seiders v. Toledo, 83 Ohio St. (1908) 495; Wolf v. State Board of Medical Examrs., 109 Minn. (1909) 360, 123 N. W. 1074; Balling v. Board of Excise of Elizabeth, 79 N. J. L. (1909) 197, 74 Atl. 277; Gray v. McLendon, 134 Ga. (1910) 224, 67 S. E. 859; Reaves v. Ainsworth, 219 U. S. (1911) 296, 55 L. ed. 225; Balch v. Glenn, 85 Kans. (1911) 735, 119 Pac. 67; Low Wah Suey v. Backus, 225 U. S. (1912) 460, 56 L. ed. 1165; Smith v. Hitchcock, 226 U. S. (1912) 53, 57 L. ed. 119; Tiaco v. Forbes, 228 U. S. (1913) 549, 57 L. ed. 960; Commonwealth v.

FORDHAM UNIVERSITY LIBRARY

that they were beginning to look to the inherent elements of justice in a determination rather than to the form by which that decision might be arrived at. It was then that the courts developed the doctrine of notice and hearing.

In the eighteenth century the English courts had insisted on the necessity of a notice and hearing in any determination of a quasi-judicial nature, some even declaring that it was guaranteed by natural right.[22] The North

Plymouth Coal Co., 232 Pa. St. (1914) 141, 81 Atl. 148; Montgomery Bank & Tr. Co. v. Walker, 181 Ala. (1913) 368, 61 So. 951; Ex parte Taylor, 68 Fla. (1914) 61, 66 So. 292; Mehlos v. Milwaukee, 160 Wis. (1914) 339, 151 N. W. 1102; Title Guaranty & Sur. Co. v. Idaho, 240 U. S. (1915) 136, 60 L. ed. 566; Colvill v. Fox, 51 Mont. (1915) 72, 149 Pac. 496; Killgore v. Zinkhan, 274 Fed. (1921) 140; Riley v. Wright, 151 Ga. (1921) 609, 107 S. E. 857; Ex parte Radivoeff, 278 Fed. (1922) 227; Tulare Water Co. v. State Water Commn., 187 Cal. (1923) 533, 202 Pac. 874; Reagan v. Texarkana, 238 S. W. (Tex., 1922) 717; Martin v. Bennett, 291 Fed. (1923) 626; United States v. Dunton, 288 Fed. (1923) 959; United States Harness Co. v. Graham, 288 Fed. (1923) 929; Macon v. Anderson, 155 Ga. (1923) 607, 117 S. E. 753; Commerce Commn. ex rel. v. Cleveland, C. C., &c. R. Co., 309 Ill. (1923) 165, 140 N. E. 868; United States ex rel. v. Tod, 274 U. S. (1924) 131, 68 L. ed. 590; Bennett v. Collins, 157 Ga. (1924) 525, 121 S. E. 809; People's Natural Gas Co. v. Public Service Commn., 123 Atl. (Pa., 1924) 799; Humboldt Land & Cattle Co. v. Dist. Ct., 224 Pac. (Nev., 1924) 612.

In many cases the courts have considered that legislative process was due process. Board of Water Commrs. v. Johnson, 86 Conn. (1912) 151, 84 Atl. 727; State ex rel. v. Mason, 153 Mo. (1899) 23, 54 S. W. 524; American School of Magnetic Healing v. McAnnulty, 102 Fed. (1900) 565; Missouri Drug Co. v. Wyman, 129 Fed. (1904) 623; State v. Aberdeen, 34 Wash. (1904) 61, 74 Pac. 1022; Petition of Pittsburg, 217 Pa. (1907) 227, 66 Atl. 348; Malone v. Williams, 118 Tenn. (1907) 390, 103 S. W. 798; Risley v. Utica, 168 Fed. (1909) 737; Lund v. Newton County, 47 Ind. App. (1910) 175, 93 N. E. 179; Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. (1913) 278, 57 L. ed. 510; Lewis Pub. Co. v. Morgan, 229 U. S. (1913) 288, 57 L. ed. 1190; Central R. Co. of New Jersey v. Jersey City, 199 Fed. (1914) 237; Dibrell v. Coleman, 172 S. W. (Tex., 1915) 550; Rice v. Roberts, 177 S. W. (Tex. Civ. App., 1915) 149; Des Moines v. Manhattan Oil Co., 193 Iowa (1921) 1096, 184 N. W. 823; Silvey v. Montgomery County, 273 Fed. (1921) 202; In re Barnes' Estate, 187 Cal. (1922) 566, 203 Pac. 100; Pauly v. Keebler, 175 Wis. (1922) 428, 185 N. W. 554; People v. Moynihan, 200 N. Y. S. (1923) 434; Bank of Arizona v. Howe, 293 Fed. (1924) 600; Ex parte Messer, 87 Fla. (1924) 92, 99 So. 330; State ex rel. v. Fleming, 129 Wash. (1923) 646, 225 Pac. 647; Buffalo v. Neubeck, 209 App. Div. (1924) 386, 204 N. Y. S. 737; Indian Refining Co. v. Taylor, 195 Ind. (1924) 223, 143 N. E. 682; Maxwell v. Miami, 87 Fla. (1924) 107, 100 So. 147; In re Bonds of Orosi Pub. Util. Dist., 235 Pac. (Cal., 1925) 1004.

[22] Rex v. Cambridge, 8 Mod. (1715) 148, 2 Ld. Ray. 1334, Fortescue, 202; Rex v. Croke, 1 Cowp. (1775) 26; Rex v. Gaskin, 8 Term. R. (1779) 209.

Carolina court spoke of it in 1812, but it seems not to have been linked with due process until well toward the middle of the century.[23] The doctrine was brought into prominence by liquor legislation which attempted to secure more expeditious methods of law enforcement than were possible under the tedious forms of the common-law procedure. The summary methods put on the statute books were generally upheld if there was an adequate provision for a notice and hearing,[24] but where such provision was lacking the law had brought sledding in the courts.[25] The influence of these decisions is reflected in a number of cases involving other matters. The rule thus became generally accepted that substantial rights of property could not be impaired without an opportunity being given to the defendant to present his case.[26] As thus developed, this doc-

[23] Hamilton v. Adams, 1 Murphy (N. Car., 1812) 161; Regents of the University v. Williams, 9 Gill & J. (Md., 1838) 365; Ervine's Appeal, 16 Pa. (1851) 256, 55 Am. Dec. 499; State v. Simons, 2 Speers (S. Car., 1844), 761 at 767.

[24] State v. Brennan's Liquors, 25 Conn. (1856) 278; State v. Paul, 5 R. I. (1858) 185; State v. Keeran, 5 R. I. (1858) 497; Commonwealth v. Kendall, 12 Cush. (Mass., 1853) 414; Gill v. Parker, 31 Vt. (1859) 610; Ingram v. State, 39 Ala. (1834) 247, 84 Am. Dec. 782; Jones v. People, 14 Ill. (1852) 196; Pierce v. State, 13 N. H. (1843) 536.

[25] Saco v. Wentworth, 37 Maine (1853) 165, 58 Am. Dec. 786; State v. Snow, 3 R. I. (1854) 64; Fisher v. McGirr, 1 Gray (Mass., 1854) 1, 61 Am. Dec. 381; Greene v. James, Fed. Cas. No. 5766, 2 Curtis (U. S., 1854) 187; Hibbard v. People, 4 Mich. (1856) 125; Hewitt v. State, 25 Tex. (1860) 722; In re Opinion of the Justices, 25 N. H. (1852) 537.

[26] Donovan v. Vicksburgh, 29 Miss. (1855) 247, 64 Am. Dec. 143; Griffin v. Mixon, 38 Miss. (1860) 424; Ex parte Grace, 12 Iowa (1861) 208, 79 Am. Dec. 529; Ames v. Port Huron Log Driving & Booming Co., 11 Mich. (1863) 139, 83 Am. Dec. 731; In re Adrian Janes, 30 How. Pr. (N. Y., 1866) 446; Lang v. People, 14 Mich. (1866) 439; Rockwell v. Nearing, 35 N. Y. (1866) 302 at 305; East Kingston v. Towle, 48 N. H. (1868) 57, 97 Am. Dec. 575, 2 Am. Rep. 174. This rule has been very widely applied in similar cases. Brown v. Hummel, 6 Pa. (1847) 86, 47 Am. Dec. 431; Deblois v. Barker, 4 R. I. (1857) 445; Griffin v. Mixon, 38 Miss. (1860) 424; Clark v. Lewis, 35 Ill. (1864) 417; Rutherford's Case, 72 Pa. St. (1871) 82, 13 Am. Rep. 655; Gilchrist v. Schmidling, 12 Kans. (1873) 263; Marshall v. McDaniel, 12 Bush. (Ky., 1876) 378; Gamble v. McCrady, 75 N. Car. (1876) 509; Stuart v. Palmer, 74 N. Y. (1878) 183, 30 Am. Rep. 289; Hutson v. Woodbridge Protec. Dist., 79 Cal. (1880) 90, 16 Pac. 549, 21 Pac. 435; Baltimore v. Scharf, 54 Md. (1880) 499; Hollett v. Denver, 4 Colo. L. R. (1883) 565; Scott v. Brackett, 89 Ind. (1883) 413; Gilmore v. Hentig, 33 Kans. (1885) 156, 5 Pac. 781; Kansas City v. Huling, 87 Mo. (1885) 203; Baltimore &c. R. Co. v. Sawvel, 138 Ind. (1891) 696, 37 N. E. 1013; Sligh v. Grand Rapids, 84 Mich. (1891) 497, 47 N. W.

1093; Rouse v. Donovan, 104 Mich. (1895) 234, 62 N. W. 359; Hayes v. Douglas County, 92 Wis. (1895) 429, 65 N. W. 482; Violett v. Alexandria, 92 Va. (1896) 561, 23 S. E. 909; Roberts v. Smith, 115 Mich. (1897) 5, 72 N. W. 1091; Grieg v. Ware, 25 Colo. (1898) 184, 55 Pac. 163; Coleman v. Glenn, 103 Ga. (1898) 458, 30 S. E. 297; State v. Weyerhauser, 68 Minn. (1897) 353, 71 N. W. 265; Hennessy v. Douglas County, 99 Wis. (1898) 129, 74 N. W. 983; People ex rel. v. Pitt, 169 N. Y. (1899) 521, 62 N. E. 662; Wilmerding v. Corbin Banking Co., 126 Ala. (1900) 268, 28 So. 640; City Council of Montgomery v. Birdsong, 126 Ala. (1900) 632, 28 So. 522; King v. Portland, 38 Ore. (1900) 402, 63 Pac. 2; Carson v. Brockton Sewerage Commrs., 175 Mass. (1900) 242, 56 N. E. 1; Dodd v. Hart, 8 Del. Ch. (1900) 448, 68 Atl. 397; Miller v. Colonial Forestry Co., 73 Conn. (1901) 500, 48 Atl. 98; Church v. South Kingston, 22 R. I. (1901) 381, 48 Atl. 3; Barber Asphalt Pav. Co. v. Ridge, 169 Mo. (1902) 376, 68 S. W. 1043; Carter v. Colby, 71 N. H. (1902) 230, 51 Atl. 904; Chicago &c. R. Co. v. Keith, 67 Ohio St. (1902) 279, 65 N. E. 1020; Godfrey v. Bennington Watch Co., 75 Vt. (1903) 350, 55 Atl. 654; Meacham v. Bear Valley Irrig. Co., 145 Cal. (1904) 606, 79 Pac. 281; In re Boyett, 136 N. Car. (1904) 415, 48 S. E. 789; Riglander v. Star Co., 98 App. Div. (1904) 101, 90 N. Y. S. 772; Larson v. Christianson, 14 N. Dak. (1905) 476, 106 N. W. 51; Baltimore Sav. Bank v. Weeks, 103 Md. (1906) 601, 64 Atl. 295; Caton v. Western Clay Drainage Dist., 87 Ark. (1908) 8, 112 S. W. 145; American De Forest Wireless Telegraph Co. v. San Francisco Superior Ct., 153 Cal. (1908) 533, 96 Pac. 15; State v. Derry, 171 Ind. (1908) 18, 85 N. E. 765; Smith v. State Board of Med. Examrs., 140 Iowa (1908) 66, 117 N. W. 1116; Persing v. Reno Stock Brokerage Co., 30 Nev. (1908) 342, 96 Pac. 1054; McConnell v. Bell, 121 Tenn. (1908) 198, 114 S. W. 203; Wilber v. Reed, 84 Nebr. (1909) 767, 122 N. W. 53; Fisheries Commn. v. Hampton Roads Oyster Packers' & Planters' Assn., 109 Va. (1909) 565, 64 S. E. 1041; Gilman v. Tucker, 128 N. Y. (1911) 190, 28 N. E. 1040; Ives v. South Buffalo R. Co., 201 N. Y. (1911) 271, 94 N. E. 431; Ekern v. McGovern, 154 Wis. (1913) 157, 142 N. W. 595; State v. Clement Natl. Bank, 84 Vt. (1913) 167, 78 Atl. 944; Pierce v. Huntsville, 185 Ala. (1914) 490, 64 So. 301; Sexton v. Newark Dist. Tel. Co., 84 N. J. L. (1914) 85, 86 Atl. 451; Cherokee County Pub. Co. v. Cherokee County, 48 Okla. (1915) 722, 151 Pac. 187; Conover v. West Jersey Mtg. Co., 87 N. J. Eq. (1916) 16, 99 Atl. 604; Falender v. Atkins, 186 Ind. (1917) 455, 114 N. E. 965; Morrell v. Lalonde, 44 R. I. (1921) 20, 114 Atl. 178; State v. Security Sav. Bank, 186 Cal. (1921) 419, 199 Pac. 791; Breiholz v. Board of Supervisors, 186 Iowa (1921) 1147, 173 N. W. 1; Atlanta &c. R. Co. v. Easley, 117 S. Car. (1921) 494, 109 S. E. 285; Banker's Trust Co. v. Blodgett, 96 Conn. (1921) 361, 114 Atl. 104; Northern Trust Co. v. Sanford, 308 Ill. (1923) 381, 139 N. E. 603; Redzina v. Provident Inst., 121 Atl. (N. J. Ch., 1923) 519; Strandberg v. Stringer, 25 Wash. (1923) 358, 216 Pac. 25; Willis v. Lafayette-Phoenix Garage Co., 202 Ky. (1924) 554, 260 S. W. 364; Buffalo v. Neubeck, 209 App. Div. (1924) 386, 204 N. Y. S. 737; Gunter v. Sanford, 186 N. Car. (1924) 452, 120 S. E. 41; Borrough of Dunmore v. Dempsey, 280 Pa. (1924) 190, 124 Atl. 347; Hill v. Davis, 257 S. W. (Tex. Civ. App., 1924) 340; McNeely v. Vidalia, 157 La. (1925) 338, 102 So. 422; Davis v. Calderwood, 146 N. E. (Mass., 1925) 708; Northern Cedar Co. v. French, 131 Wash. (1924) 394, 230 Pac. 837; Matthews v. Matthews, 240 N. Y. (1925) 28; Leininger v. Reichle, 148 N. E. (Ill., 1925) 384; Bratt v. State Industrial Accident Commn., 236 Pac. (Ore., 1925) 478; Pizer v. Hunt, 148 N. E. (Mass., 1925) 801.

trine having been subsequently adopted by the United States Supreme Court,[27] can now be regarded as one of the elements of the law of the land as regards procedure. Like the idea of "judicial process" and the doctrine of trial by jury, out of which it grew,[28] it was used by the courts in their effort to soften the harsher effects of due process as a limitation on legislative power.[29]

[27] Pearson v. Yewdall, 95 U. S. (1877) 294, 24 L. ed. 436; Pennoyer v. Neff, 95 U. S. (1877) 714, 24 L. ed. 565; Davidson v. New Orleans, 96 U. S. (1878) 97, 24 L. ed. 616; Santa Clara County v. Southern Pacific R. Co., 118 U. S. (1886) 394, 30 L. ed. 118; Paulsen v. Portland, 149 U. S. (1893) 30, 37 L. ed. 637; Holden v. Hardy, 169 U. S. (1898) 366, 42 L. ed. 780; Iowa Cent. R. Co. v. Iowa, 160 U. S. (1896) 389, 40 L. ed. 467; Roller v. Holly, 176 U. S. (1899) 398, 44 L. ed. 520; Louisville &c. R. Co. v. Schmidt, 177 U. S. (1900) 230, 44 L. ed. 747; Detroit v. Parker, 181 U. S. (1901) 399, 45 L. ed. 917; Simon v. Craft, 182 U. S. (1901) 427, 45 L. ed. 1165; Louisville &c. R. Co. v. Kentucky, 183 U. S. (1902) 503, 46 L. ed. 298; Voight v. Detroit, 184 U. S. (1902) 115, 46 L. ed. 459; Hubbert v. Campbellsville Lumber Co., 191 U. S. (1903) 70, 48 L. ed. 101; Consolidated Rendering Co. v. Vermont, 207 U. S. (1908) 541, 52 L. ed. 327; Cleveland C. C. &c. R. Co. v. Porter, 210 U. S. (1908) 177, 52 L. ed. 1012; Twining v. New Jersey, 211 U. S. (1908) 78, 53 L. ed. 97; Garfield v. United States, 211 U. S. (1908) 249, 53 L. ed. 168; Ontario Land Co. v. Yordy, 212 U. S. (1909) 152, 53 L. ed. 449; American Land Co. v. Zeiss, 219 U. S. (1910) 47, 55 L. ed. 82; Riverside &c. Cotton Mills v. Menefee, 237 U. S. (1915) 189, 59 L. ed. 910; Mountain Timber Co. v. Washington, 243 U. S. (1917) 219, 61 L. ed. 685; Pullman Co. v. Knott, 235 U. S. (1914) 23, 59 L. ed. 105; McGregor v. Hogan, 263 U. S. (1924) 234, 68 L. ed. 282; Security Savings Bank v. California, 263 U. S. (1924) 282, 68 L. ed. 301; North Laramie Land Co. v. Hoffman, 268 U. S. (1925) 276, 69 L. ed. 953; Hearfield v. Bridges, 75 Fed. (1851) 47; Burns v. Multnomah R. Co., 15 Fed. (1883) 177; Scott v. Toledo, 36 Fed. (1888) 385; Murdock v. Cincinnati, 39 Fed. (1889) 891; Meyers v. Shields, 61 Fed. (1894) 713; Fay v. Springfield, 94 Fed. (1899) 409; Charles v. Marion, 98 Fed. (1899) 166; Ex parte Sticker, 109 Fed. (1901) 145; Sing Tuck v. United States, 128 Fed. (1904) 592; Consolidated Gas Co. v. Mayer, 146 Fed. (1906) 150; Cella Commission Co. v. Bohlinger, 147 Fed. (1906) 419; Jackson Lumber Co. v. McCrimmon, 164 Fed. (1908) 759; King Tonopah Mining Co. v. Lynch, 232 Fed. (1916) 485; Callaway v. Bohler, 291 Fed. (1923) 243; Dukich v. Blair, 3 Fed. (2d) (1925) 302.

[28] The close relation between the idea of due process as "judicial process" and "notice and hearing" is shown in Parsons v. Russell, 11 Mich. (1863) 113, 83 Am. Dec. 728.

[29] The close relation between the development of the procedural aspects of due process and its acceptance as a limitation on legislative power is shown in those cases where the courts held legislative acts giving title of property from one person to another void because there was no notice and hearing. Bayard v. Singleton, 1 N. Car. (1787) 5, 1 Mart. 48; Vanhorne v. Dorrance, 2 Dall. (U. S., 1795) 304, 1 L. ed. 391; Robinson v. Barfield, 2 Murphy (6 N. Car., 1818) 391; State v. Heyward, 3 Rich. (S. Car., 1832) 389; Gaines v. Buford, 1 Dana (Ky., 1833) 481; Hoke v. Hender-

§ 89. But the courts found even the criterion of notice and hearing too strict for universal application. While it became the standard rule for testing the validity of administrative procedure, it could not always be applied even in this class of cases. Whenever it was appropriate, the courts insisted on a notice and hearing, but in the administration of tax assessments such a procedure might have blocked the whole governmental machine. The exigencies of efficiency in the collection of taxes made impossible the formalities of a personal notice.[30] The courts saw this clearly and consequently held that a general notice,[31] with

son, 15 N. Car. (1833) 1 at 15, 25 Am. Dec. 677; In re John and Cherry Street, 19 Wend. (N. Y., 1839) 659; Sheppard v. Johnson, 21 Tenn. (1841) 285; Reed v. Wright, 2 G. Greene (Iowa, 1849) 15; Newland v. Marsh, 19 Ill. (1857) 376; Griffin v. Mixon, 38 Miss. (1860) 424; Billings v. Hall, 7 Cal. (1857) 1; Barnes v. Barnes, 53 N. Car. (1861) 366; Norris v. Doniphan, 61 Ky. (1863) 385; Groesbeck v. Seeley, 13 Mich. (1865) 329.

[30] See the early case of McCarrol v. Weeks, 5 Hay. (Tenn., 1814) 247.

[31] State Railroad Tax Cases, 92 U. S. (1875) 575, 23 L. ed. 663; McMillen v. Anderson, 95 U. S. (1877) 37, 24 L. ed. 335; Hagar v. Reclamation Dist. No. 108, 111 U. S. (1884) 701, 28 L. ed. 569; Pittsburgh, C. C. &c. R. Co. v. Backus, 154 U. S. (1894) 421, 38 L. ed. 1031; Winona & St. P. Land Co. v. Minnesota, 159 U. S. (1895) 526, 40 L. ed. 247; Merchant's Nat. Bank v. Pennsylvania, 167 U. S. (1897) 461 at 466, 42 L. ed. 236; Weyerhaueser v. Minnesota, 176 U. S. (1900) 550, 44 L. ed. 583; Gallup v. Schmidt, 183 U. S. (1902) 300, 46 L. ed. 207; Glidden v. Harrington, 189 U. S. (1903) 255, 47 L. ed. 798; Corry v. Baltimore, 196 U. S. (1905) 466, 49 L. ed. 556; Security Tr. & Saf. Vault Co. v. Lexington, 203 U. S. (1906) 323, 51 L. ed. 204; Ontario Land Co. v. Yordy, 212 U. S. (1909) 152, 53 L. ed. 449; Clement Nat. Bank v. Vermont, 231 U. S. (1913) 120, 58 L. ed. 147; Pullman Co. v. Knott, 235 U. S. (1914) 23, 59 L. ed. 105; Hancock v. Muskogee, 250 U. S. (1919) 454, 63 L. ed. 1081; McGregor v. Hogan, 263 U. S. (1924) 234, 68 L. ed. 282; Williams v. Albany County Supervisors, 21 Fed. (1884) 99; Platt v. Poe, 69 Fed. (1895) 546; McLeod v. Receveur, 71 Fed. (1896) 455; Oskamp v. Lewis, 103 Fed. (1900) 906; Jackson Lumber Co. v. McCrimmon, 164 Fed. (1908) 759; Western Union Tel. Co. v. Trapp, 186 Fed. (1911) 114; Chicago, R. I. &c. R. Co. v. Risty, 282 Fed. (1922) 364; New Orleans v. Cannon, 10 La. Ann. (1855) 764; In re McPherson, 104 N. Y. (1887) 306, 10 N. E. 685; Baltimore & O. C. R. Co. v. Sawvel, 138 Ind. (1894) 696, 37 N. E. 1013; Wilmington v. Sprunt, 114 N. Car. (1894) 310, 19 S. E. 348; Nelson Lumber Co. v. McKinnon, 61 Minn. (1895) 238, 63 N. W. 630; State v. Armstrong, 19 Utah (1899) 117, 56 Pac. 1076; American Refrigerator Trans. Co. v. Thomas, 28 Colo. (1900) 119, 63 Pac. 410; Ferry v. Campbell, 110 Iowa (1900) 290, 81 N. W. 604; Vanceburg &c. Tpk. Road Co. v. Maysville &c. R. Co., 63 S. W. (Ky., 1901) 749; State ex rel. v. Back, 72 Nebr. (1901) 402, 100 N. W. 952; Godfey v. Bennington Water Co., 75 Vt. (1903) 350, 55 Atl. 654; State ex rel. v. Vogelsang, 183 Mo. (1904) 17, 81 S. W. 1087; Hostetter v. State, 26 Ohio Cir. Ct. R. (1904) 702; Peoples ex rel. v. Wells, 181 N. Y. (1905) 252, 73 N. E. 1025; Foster v. Rowe, 128 Wis. (1906) 326,

107 N. W. 635; State v. Several Parcels of Land, 83 Nebr. (1908) 13, 119 N. W. 21; People ex rel. v. Feitner, 191 N. Y. (1908) 88, 83 N. E. 592; Anderson v. Ritterbusch, 22 Okla. (1908) 761, 98 Pac. 1002; Strange v. Oconto Land Co., 136 Wis. (1908) 516, 117 N. W. 1023; Shippen Bros. Lumber Co. v. Elliott, 134 Ga. (1910) 699, 68 S. E. 509; In re Sioux City Stockyards Co., 149 Iowa (1910) 5, 127 N. W. 1102; Ray v. Armstrong, 140 Ky. (1910) 800, 131 S. W. 1039; People ex rel. v. National Box Co., 248 Ill. (1911) 140, 93 N. E. 778; East Tennessee Brewing Co. v. Currier, 126 Tenn. (1912) 535, 150 S. W. 541; People ex rel. v. Pitcher, 56 Colo. (1914) 343, 138 Pac. 509; West Hartford v. Coleman, 88 Conn. (1914) 78, 89 Atl. 1120; People ex rel. v. Day, 277 Ill. (1917) 543, 115 N. E. 732; Chicago &c. R. Co. v. Board of Supervisors of Hamilton County, 182 Iowa (1917) 60, 162 N. W. 868, 165 N. W. 390; State ex rel. v. Wheatley, 113 Miss. (1917) 55, 74 So. 427; Pohl v Chicago, M. &c. R. Co., 52 Mont. (1917) 572, 160 Pac. 515; Commonwealth v. United Cigarette Mach. Co., 120 Va. (1917) 835, 92 S. E. 901; Empire Min. Co. v. Bowers, 202 Ala. (1918) 85, 79 So. 561; Jacobs v. Paris, 131 Ark. (1918) 28, 198 S. W. 134; Shewmake Bros. v. Dominy, 147 Ga. (1918) 577, 94 S. E. 999; People v. Arnold Bros., 282 Ill. (1918) 305, 118 N. E. 702; Harmon v. Bolley, 187 Ind. (1918) 511, 120 N. E. 33; Maxwell v. Page, 23 N. Mex. (1918) 356, 168 Pac. 492; Powers v. Richmond, 122 Va. (1918) 328, 94 S. E. 803; Drainage Dist. No. 7 v. Bernards, 89 Ore. (1918) 531, 174 Pac. 1167; Bay Bottom Drainage Dist. v. Stokes, 291 Ill. (1920) 68, 125 N. E. 716; State v. Wells Fargo & Co., 38 Nev. (1919) 505, 150 Pac. 836; Miller's Mutual Fire Ins. Co. v. Austin, 210 S. W. (Tex. Civ. App., 1919) 825; Hammond v. Winder, 100 Ohio (1920) 433, 126 N. E. 409; People v. St. Louis, 297 Ill. (1921) 199, 120 N. E. 366; Handley v. Graham, 187 Ky. (1920) 316, 219 S. W. 417; Fayette County v. Wells, 195 Ky. (1922) 608, 243 S. W. 4; Chelsea v. Treasurer and Receiver General, 237 Mass. (1921) 422, 130 N. E. 397; Northwest Auto Co. v. Hurlburt, 104 Ore. (1922) 398, 207 Pac. 161; Santa Clara Valley Land Co. v. Meehan, 62 Cal. App. (1923) 531, 217 Pac. 787; State ex rel. v. McCune, 252 S. W. (Mo., 1923) 657; Smith v. Hurlburt, 108 Ore. (1923) 690, 217 Pac. 1093; Bergen County R. Co. v. State Board of Taxes & Assessment, 98 N. J. L. (1923) 858, 121 Atl. 150; Bogigian v. Commissioner of Corporations & Taxation, 248 Mass. (1924) 545, 143 N. E. 671; Barber v. Galloway, 231 Pac. (Cal., 1924) 34; Haeussler Ins. Co. v. Bates, 306 Mo. (1925) 392, 267 S. W. 632.

If the assessment or proposed raise in assessment were a special or individual one, the courts retained, in the majority of cases, the original doctrine, and ruled that the notice had to be an individual one. Williams v. Eggleston, 170 U. S. (1893) 304, 42 L. ed. 1047; Bauman v. Ross, 167 U. S. (1897) 548, 42 L. ed. 270; Voigt v. Detroit, 184 U. S. (1902) 115, 46 L. ed. 459; Hibben v. Smith, 191 U. S. (1903) 310, 48 L. ed. 195; Soliah v. Heskin, 222 U. S. (1912) 522, 56 L. ed. 294; Campbell v. Olney, 262 U. S. (1923) 352, 67 L. ed. 1021; Sonoma County Tax Case, 13 Fed. (1882) 789; Scott v. Toledo, 36 Fed. (1888) 385 at 392; Meyers v. Shields, 61 Fed. (1894) 713 at 721; Brinkerhoff v. Brumfield, 94 Fed. (1899) 422; Orr v. Allen, 245 Fed. (1917) 486; Brougham v. Kansas City, 263 Fed. (1920) 115; Dukich v. Blair, 3 Fed. (2d) (1925) 302; Kuntz v. Sumption, 117 Ind. (1889) 1, 19 N. E. 474; Tripp v. Yankton, 10 S. Dak. (1898) 516, 74 N. W. 447; Erickson v. Cass County, 11 N. Dak. (1902) 494, 92 N. W. 841; In re New York, 89 N. Y. S. (1904) 552; Jackson v. Denver, 41 Colo. (1907) 362, 92 Pac. 690; Oregon Short Line R. Co. v. Pioneer Irrig. Dist., 16 Idaho (1909) 578, 102 Pac. 904; Gage v. Chicago, 225 Ill. (1907) 218, 80 N. E. 127; Reed v. Cedar Rapids, 137 Iowa (1907) 107, 111 N. W. 1013;

a hearing at some stage of the proceedings was sufficient.[32]

Naylor v. Harrisonville, 207 Mo. (1907) 341, 105 S. W. 1074; Kinston v. Loftin, 149 N. Car. (1908) 255, 62 S. E. 1069; Billings Sugar Co. v. Fish, 40 Mont. (1910) 256, 106 Pac. 565; Brookes v. Oakland, 160 Cal. (1911) 423, 117 Pac. 433; Bosworth v. Rome, 136 Ga. (1911) 398; Bailey v. Sioux Falls, 28 S. Dak. (1911) 118, 132 N. W. 703; Argyle v. Johnson, 39 Utah (1911) 500, 118 Pac. 487; Corliss v. Richford, 85 Vt. (1911) 85, 81 Atl. 234; State ex rel. v. Abraham, 64 Wash. (1911) 621, 117 Pac. 501; Newton v. Superior, 146 Wis. (1911) 308, 130 N. W. 242, 131 N. W. 986; Millikan v. Crail, 177 Ind. (1912) 426, 98 N. E. 291; In re Riverside Park, 119 Minn. (1912) 334, 138 N. W. 426; Manners v. Waterbury, 86 Conn. (1913) 573, 86 Atl. 14; Palmberg v. Kinney, 65 Ore. (1913) 220, 132 Pac. 538; Barnett v. L. R. Figg Co., 165 Ky. (1915) 479, 177 S. W. 275; Appeal Tax Court Phillip Wagner, 120 Md. (1915) 671, 87 Atl. 1040; Roswell v. Bateman, 20 N. Mex. (1915) 77, 146 Pac. 950; Day v. Dunkirk, 86 Misc. (1915) 266, 148 N. Y. S. 299; Shurman v. Atlanta, 148 Ga. (1918) 1, 95 S. E. 698; Board of Levee Commrs. v. Johnson, 178 Ky. (1918) 287, 199 S. W. 8; Bosworth v. Evansville &c. Packet Co., 179 Ky. (1918) 710, 201 S. W. 2; State v. Erwin, 139 Tenn. (1918) 341, 200 S. W. 973; Coleman v. Spring Const. Co., 41 Cal. App. (1919) 201, 182 Pac. 473; Hancock v. Muskogee, 66 Okla. (1919) 195, 168 Pac. 445; House v. Road Imp. Dist. No. 2, 158 Ark. (1922) 330, 251 S. W. 12; Anderson v. Ocala, 83 Fla. (1922) 344, 91 So. 182; Brite v. Grubbs, 144 Tenn. (1922) 647, 234 S. W. 759; Massey v. Arkansas & Missouri Highway Dist., 163 Ark. (1924) 63, 259 S. W. 387; Brown v. Electrical Dist. No. 2, 26 Ariz. (1924) 181, 223 Pac. 1068; Valdosta v. Harris, 156 Ga. (1924) 490, 119 S. E. 625; Board of Trustees v. Board of Supervisors, 198 Iowa (1924) 117, 197 N. W. 82; Gunter v. Sanford, 186 N. Car. (1924) 452, 120 S. E. 41.

Unless this requirement is fulfilled courts of equity may restrain the collection of the tax. Huling v. Ehrick, 183 Ill. (1899) 315, 55 N. E. 636. See also, Darling v. Gunn, 50 Ill. (1869) 424; Lipke v. Lederer, 259 U. S. (1921) 557, 66 L. ed. 1061; Fontenot v. Accardo, 278 Fed. (1922) 871; Markham v. Carver, 188 N. Car. (1925) 615, 125 S. E. 409.

On the question of notice in tax cases generally see Philadelphia v. Miller, 49 Pa. (1865) 440; Lehman v. Robinson, 59 Ala. (1877) 219; Turner v. Wade, 254 U. S. (1920) 64, 65 L. ed. 134; Camunas v. Porto Rico R. L. & P. Co., 272 Fed. (1921) 924.

[32] McMillen v. Anderson, 95 U. S. (1877) 37, 24 L. ed. 335. See also n. 31.

A similar rule has been very widely applied in eminent domain cases. Pearson v. Yewdall, 95 U. S. (1877) 294, 24 L. ed. 436; Marchant v. Pennsylvania R. Co., 153 U. S. (1894) 380, 38 L. ed. 751; Long Island Water Supply Co. v. Brooklyn, 166 U. S. (1897) 685, 41 L. ed. 1165; Backus v. Fort Street Union Depot, 169 U. S. (1898) 557, 42 L. ed. 853; Sears v. Akron, 246 U. S. (1918) 242, 62 L. ed. 688; Louisville &c. R. Co. v. Western Union Tel. Co., 250 U. S. (1919) 363, 63 L. R. A. 1032; Bragg v. Weaver, 251 U. S. (1920) 57, 64 L. ed. 135; Crane v. Hahlo, 258 U. S. (1922) 142, 66 L. ed. 514; Rindge Co. v. Los Angeles County, 262 U. S. (1923) 700, 67 L. ed. 1186; Burns v. Multnomah R. Co., 15 Fed. (1883) 177; Dyer v. Baltimore, 140 Fed. (1905) 880; In re Condemnations for Imp. of Rouge River, 266 Fed. (1920) 105; Alabama Power Co. v. Gulf Power Co., 283 Fed. (1923) 606; Peirce v. Somersworth, 10 N. H. (1839) 369; Stewart v. Baltimore, 7 Md. (1855) 500; Zack v. Pennsylvania R. Co., 25 Pa. St. (1855) 394; Gilmer v. Lime Point, 18 Cal. (1861) 229; State

It became necessary to restrict even this rule. Although there must be an opportunity for some sort of hearing, the

v. Jersey City, 30 N. J. L. (1862) 93; Langford v. Ramsey County, 16 Minn. (1871) 375; Atlanta v. Central R. & Banking Co., 53 Ga. (1874) 120; Rhine v. McKinney, 53 Tex. (1880) 354; Kundinger v. Saginaw, 59 Mich. (1886) 355, 26 N. W. 634; Croft v. Bennington & R. R. Co., 64 Vt. (1892) 1, 23 Atl. 922; State ex rel. v. Oshkosh, 84 Wis. (1893) 548, 54 N. W. 1095; McGavock v. Omaha, 40 Nebr. (1894) 64, 58 N. W. 543; In re Long Island Water Sup. Co., 143 N. Y. (1894) 596, 38 N. E. 983; Branson v. Gee, 25 Ore. (1894) 462, 36 Pac. 527; In re Smith's Petition, 9 Wash. (1894) 85, 37 Pac. 311, 494; Hansen v. Hammer, 15 Wash. (1896) 315, 46 Pac. 332; Miller v. Cass County, 39 S. W. (Tex., 1897) 966; Howard v. Supervisors of Clay County, 54 Nebr. (1898) 443, 74 N. W. 953; Apex Transp. Co. v. Garbade, 32 Ore. (1898) 582, 52 Pac. 573, 54 Pac. 367, 882; Matter of Opening of Oneida St., 37 App. Div. (1899) 266, 55 N. Y. S. 959; Miller v. Colonial Forestry Co., 73 Conn. (1901) 500, 48 Atl. 98; Aldredge v. School Dist. No. 16, 10 Okla. (1901) 694, 65 Pac. 96; Chicago & E. R. Co. v. Keith, 67 Ohio St. (1902) 279, 65 N. E. 1020; Quarles v. Sparta, 2 Tenn. Ch. App. (1902) 714; State v. Jones, 139 N. Car. (1905) 613, 52 S. E. 240; Sterritt v. Young, 14 Wyo. (1905) 146, 82 Pac. 946; Morrison v. Indianapolis & W. R. Co., 166 Ind. (1906) 511, 76 N. E. 961, 77 N. E. 744; Young v. Red Fork Levee Dist., 124 Ark. (1917) 61, 186 S. W. 604; Great Northern R. Co. v. Minneapolis, 136 Minn. (1917) 1, 161 N. W. 231; Governor & Council v. Morey, 78 N. H. (1917) 125, 97 Atl. 375; Matter of Newton Ave., 173 App. Div. (1917) 32, 159 N. Y. S. 478; Sloan v. Lawrence County, 134 Ark. (1918) 121, 203 S. W. 260; Marin Municipal Water Dist. v. Marin Water & Power Co., 178 Cal. (1918) 308, 173 Pac. 469; Joslin Mfg. Co. v. Clarke, 41 R. I. (1918) 350, 103 Atl. 935; Dickerson v. Tri-County Drainage Dist., 138 Ark. (1919) 471, 212 S. W. 334; Drainage Dist. No. 2 v. Extension Ditch Co., 32 Idaho (1919) 314, 182 Pac. 847; St. Louis v. Missouri Pac. R. Co., 278 Mo. (1919) 205, 211 S. W. 671; Matter of Rochester, 184 App. Div. (1916) 369, 171 N. Y. S. 12, 224 N. Y. (1919) 386, 121 N. E. 102; Merriman v. New York, 227 N. Y. (1920) 279, 125 N. E. 500; State Highway Dept. v. Mitchell's Heirs, 142 Tenn. (1920) 58, 216 S. W. 336; Albin v. Consolidated School Dist., 106 Nebr. (1921) 719, 184 N. W. 141; Orange County v. Storm King Stone Co., 191 App. Div. (1921) 329, 181 N. Y. S. 660; Hoxie v. Gibson, 155 Ark. (1923) 338, 245 S. W. 332; Pippin v. Board of Commrs. of Okmulgee County, 87 Okla. (1923) 177, 209 Pac. 929; Dallas v. Bergfield, 245 S. W. (Tex., 1923) 749; Thompson v. New Haven, 100 Conn. (1924) 604, 124 Atl. 247; Byfield v. Newton, 247 Mass. (1924) 46, 141 N. E. 658; Minyard v. Pelucia Drainage Dist., 133 Miss. (1924) 847, 98 So. 225; Scott v. Columbus, 109 Ohio (1924) 193, 142 N. E. 25; Brown v. County State Road and Bridge Committee, 182 Wis. (1924) 480, 196 N. W. 860; North Laramie Land Co. v. Hoffman, 268 U. S. (1925) 276, 69 L. ed. 953. For the requirement of trial by jury in eminent domain cases see sec. 87, n. 7.

This hearing may be either an administrative one as in Pittsburgh, C., C., &c. R. Co. v. Backus, 154 U. S. (1894) 421, 38 L. ed. 1031; Glidden v. Harrington, 189 U. S. (1903) 255, 47 L. ed. 798; Shaw v. Mayfield, 204 Ky. (1925) 618, 265 S. W. 13 (see also cases in sec. 88, n. 21) or a judicial one in a suit to collect the taxes. Winona & St. P. Land Co. v. Minnesota, 159 U. S. (1895) 526, 536, 40 L. ed. 247; Michigan Cent. R. Co. v. Powers, 201 U. S. (1906) 245, 50 L. ed. 744; Wells Fargo & Co. v.

court held the mere failure to take advantage of the opportunity would not invalidate the proceedings.[33] In some cases the chance to put in a formal statement of the value of the property taxed had been construed to be a valid hearing.[34] In like manner the formalities of the regular judicial procedure may be dispensed with. The hearing need not involve a jury trial[35] or the hearing of any

Nevada, 248 U. S. (1919) 165, 63 L. ed. 190; Turner v. Wade, 254 U. S. (1920) 64, 65 L. ed. 134; Breiholz v. Board of Supervisors, 257 U. S. (1921) 118, 66 L. ed. 159; McGregor v. Hogan, 263 U. S. (1923) 234, 68 L. ed. 282; or even an opportunity to enjoin the action. Glenn v. Dallas Co. Levee Dist., 275 S. W. (Tex. Civ. App., 1925) 137. See also n. 24, 26, and 31.

[33] Kuntz v. Sumption, 117 Ind. (1889) 1, 19 N. E. 474. See also Hagar v. Reclamation Dist. No. 108, 111 U. S. (1884) 701, 28 L. ed. 569; Louisville &c. R. v. Schmidt, 177 U. S. (1900) 230, 44 L. ed. 747; Glidden v. Harrington, 189 U. S. (1903) 255, 47 L. ed. 798; Board of Trade v. Olson, 262 U. S. (1923) 1, 67 L. ed. 839; Johnson v. Peterson, 288 Fed. (1923) 735; Hersee v. Porter, 100 N. Y. (1885) 403, 3 N. E. 338; Bartlett v. Wilson, 59 Vt. (1886) 23, 8 Atl. 321; Lent v. Tillson, 72 Cal. (1887) 404, 14 Pac. 71; Ashley County v. Bradford, 109 La. (1902) 641, 33 So. 634; Security Finance Co. v. Hendry, 189 N. Car. (1925) 549, 127 S. E. 629.

[34] Central of Georgia R. Co. v. Wright, 207 U. S. (1907) 127, 52 L. ed. 134. See also Davidson v. New Orleans, 96 U. S. (1877) 97, 24 L. ed. 616; Hagar v. Reclamation Dist. No. 108, 111 U. S. (1884) 701, 28 L. ed. 569; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. (1890) 232, 33 L. ed. 892; Weyerhaueser v. Minnesota, 176 U. S. (1900) 550, 44 L. ed. 583; Wright v. Louisville &c. R. Co., 195 U. S. (1904) 219, 49 L. ed. 167; Security Trust & Safety Vault Co. v. Lexington, 203 U. S. (1906) 323, 51 L. ed. 204; Pullman Co. v. Knott, 235 U. S. (1914) 23, 59 L. ed. 105; St. Louis &c. R. v. Middlekamp, 256 U. S. (1920) 226, 65 L. ed. 905; Board of Commrs. v. Anderson, 68 Fed. (1895) 341; Callaway v. Bohler, 291 Fed. (1923) 243; Tucker v. Aiken, 7 N. H. (1834) 113; State v. Louisiana Mut. Ins. Co., 19 La. Ann. (1867) 474; State v. County Commrs., 5 Nev. (1869) 317; Lott v. Hubbard, 44 Ala. (1870) 593; Orena v. Sherman, 61 Cal. (1882) 101; Railway Co. v. Johnson, 108 Ill. (1883) 11; McMillan v. Carter, 6 Mont. (1886) 215, 9 Pac. 906; Valencia County v. Atchison, T. &c. R. Co., 3 N. Mex. (1886) 677, 10 Pac. 294; Hartford v. Champion, 58 Conn. (1889) 268, 20 Atl. 471; Tripp v. Torrey, 17 R. I. (1891) 359, 22 Atl. 278; Morris v. Jones, 150 Ill. (1894) 542, 37 N. E. 928; McTwiggan v. Hunter, 19 R. I. (1895) 265, 33 Atl. 5, 29 L. R. A. 526; Griggsry Const. Co. v. Freeman, 108 La. (1902) 435, 32 So. 399; Kentucky Railroad Tax Cases, 115 U. S. (1885) 321, 29 L. ed. 414. For the question of sufficient hearing in tax cases generally see n. 32.

[35] Auffmordt v. Hedden, 137 U. S. (1890) 310, 34 L. ed. 674. See also in regard to the formality required in tax hearings: Bank of Columbia v. Okely, 4 Wheat. (U. S., 1819) 235, 4 L. ed. 559; Walker v. Sauvinet, 92 U. S. (1875) 90, 23 L. ed. 678; Cheatham v. United States, 92 U. S. (1875) 85, 23 L. ed. 561; Snyder v. Marks, 109 (U. S., 1883) 189, 27 L. ed. 901; State Railroad Tax Cases, 92 U. S. (1875) 575, 23 L. ed. 663; Hilton v. Merritt, 110 U. S. (1884) 97, 28 L. ed. 83; Arnson v. Murphy, 115 U. S.

witnesses,[36] and may be *ex parte* in part,[37] or in whole if

(1885) 579, 29 L. ed. 491; Church v. Kelsey, 121 U. S. (1887) 282, 30 L. ed. 960; Oelbermann v. Merritt, 123 U. S. (1887) 356, 31 L. ed. 164; Wilson v. North Carolina, 169 U. S. (1898) 586, 42 L. ed. 865; Tinsley v. Anderson, 171 U. S. (1898) 101, 43 L. ed. 91; Marvin v. Trout, 199 U. S. (1905) 212, 50 L. ed. 157; New York Central v. White, 243 U. S. (1918) 188, 61 L. ed. 667; In re Ching Jo., 54 Fed. (1893) 334; Raymond v. Chicago &c. R. Co., 233 Fed. (1917) 239; United States v. Graham, 250 Fed. (1918) 499; Murray v. Alston, 1 Mill. Const. (S. Car., 1817) 128; Harrison v. Chiles, 13 Ky. (1823) 194; Harris v. Wood, 6 T. B. Mon. (Ky., 1828) 641; In re Northern Liberty Hose Co., 13 Pa. St. (1850) 193; Barnes v. Barnes, 53 N. Car. (1861) 366; Astor v. New York, 37 N. Y. S. (1874) 539; McKeever v. Jenks, 59 Iowa (1882) 300, 13 N. W. 295; White v. Thielens, 106 Pa. St. (1884) 173; Salt Creek Val. Tpk. Co. v. Parks, 50 Ohio St. (1893) 568, 35 N. E. 304; Colon v. Lisk, 13 App. Div. (1897) 115, 43 N. Y. S. 364; Guthrie Nat. Bank v. McElhinney, 5 Okla. (1897) 107, 47 Pac. 1062; Garnett v. Jennings, 19 Ky. L. R. (1898) 1712, 44 S. W. 382; Shaw v. Silverstein, 21 R. I. (1899) 500, 44 Atl. 931; Kirkland v. State, 72 Ark. (1904) 171, 78 S. W. 770; Tilley v. Cox, 119 Ga. (1904) 867, 47 S. E. 219; Wiler v. Logan Nat. G. & F. Co., 27 Ohio Cir. Ct. R. (1905) 257; Gunn v. Union R. Co., 27 R. I. (1905) 320, 62 Atl. 118; Hood v. Tharp, 228 Ill. (1907) 244; Sporza v. German Sav. Bank, 192 N. Y. (1908) 8, 84 N. E. 406; Davidson v. Hartford L. I. Co., 151 Mo. App. (1910) 561, 132 S. W. 291; Porter v. Mitchell, 4 Alaska (1911) 327; Lace v. Smith, 34 R. I. (1912) 1, 82 Atl. 268; Tennessee Fertilizer Co. v. McFall, 128 Tenn. (1912) 645, 163 S. W. 806; Huntley Dairy Co. v. Short, 178 Ill. App. (1913) 372; Dale v. Marvin, 76 Ore. (1915) 528, 148 Pac. 1116, 1151; Turner Creamery Co. v. Chicago, M. &c. R. Co., 36 S. Dak. (1915) 310, 154 N. W. 819; State ex rel. v. Stoughton Club, 163 Wis. (1917) 362, 158 N. W. 93; State v. Mountain Timber Co., 75 Wash. (1918) 581, 135 Pac. 645; Gray v. Mossman, 91 Conn. (1918) 430, 99 Atl. 1062; Los Angeles v. Zeller, 176 Cal. (1918) 194, 167 Pac. 849; Ashley v. Three Justices of Superior Court, 228 Mass. (1918) 63, 116 N. E. 961; Neer v. State Live Stock Sanitary Board, 40 N. Dak. (1918) 340, 168 N. W. 601; In re Miller, 173 N. Y. S. (1919) 520; State v. Aetna C. & S. Co., 84 Fla. (1919) 123, 92 So. 871; Bowman v. Virginia State Entomologist, 128 Va. (1920) 351; 105 S. E. 141; Groves v. Ware, 182 N. Car. (1921) 553, 109 S. E. 568; Nelson v. State, 84 Fla. (1923) 631, 94 So. 680; Ball v. Red Square Oil & G. Co., 113 Kans. (1923) 760, 216 Pac. 420.

[36] Tomlinson v. Board of Equalization, 88 Tenn. (1890) 1, 12 S. W. 414. It is possible, however, that the rule in this case might not be followed generally. If the statute provides for the hearing of witnesses, they must be heard. Shove v. Manitowoc, 57 Wis. (1883) 5, 14 N. W. 829. The Supreme Court of the United States has indicated that an opportunity for a hearing necessitates the hearing of offered proof. As to tax cases see Londoner v. Denver, 210 U. S. (1908) 373, at 386, 52 L. ed. 1103; as to citizenship cases see Chin Yow v. United States, 208 U. S. (1908) 8, 52 L. ed. 369.

[37] Origet v. Hedden, 155 U. S. (1894) 228, 39 L. ed. 130. See also n. 33, and the following cases: McMillen v. Anderson, 95 U. S. (1877) 37, 24 L. ed. 335; Hagar v. Reclamation Dist. No. 108, 111 U. S. (1884) 701, 28 L. ed. 569; Kentucky Railroad Tax Cases, 115 U. S. (1885) 321, 29 L. ed. 414; Palmer v. McMahon, 133 U. S. (1890) 660, 33 L. ed. 772; Paulsen v. Portland, 149 U. S. (1893) 30, 37 L. ed. 637; Winona & St. Paul Land

counsel is present.[38] In spite of these wide digressions which are permitted, the courts have shown a decided preference for a form of procedure which, at least, had the ear-marks of a judicial hearing.[39]

§ 90. The courts have also cut down the requirements of notice and hearing in the exercise of the police power by administrative bodies. At the same time they have retained certain of its essential elements. In doing this they have worked out a distinction between quasi-legislative and quasi-judicial administrative determinations.[40] In the one the administrative body is filling in the detail of a general rule for future action already laid down by the legislature, while in the other it is applying the pre-existing law to cases as they arise. In cases of quasi-judicial determinations a notice and hearing is almost invariably required.[41] Even in those cases where summary destruction is made necessary to prevent imminent danger there must be a provision for notice and hearing subsequent to the confiscation or destruction on the question of the neces-

Co. v. Minnesota, 159 U. S. (1895) 526, 40 L. ed. 247; Turpin v. Lemon, 187 U. S. (1902) 51, 47 L. ed. 70; Hibben v. Smith, 191 U. S. (1903) 310, 48 L. ed. 195; Blinn v. Nelson, 222 U. S. (1911) 1, 56 L. ed. 65.

A similar line of reasoning supports the constitutionality of proceedings under the Torrens land acts. Tyler v. Judges, 175 Mass. (1900) 71, 55 N. E. 812, 51 L. R. A. 433; State v. Westfall, 85 Minn. (1902) 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. 571; People ex rel. v. Crissman, 41 Colo. (1907) 450, 92 Pac. 949.

[38] Simon v. Craft, 182 U. S. (1901) 427, 45 L. ed. 1165.

[39] "A hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief and, if need be, by proof, however informal." Justice Moody in ordering a hearing under a statute which only implied one. Londoner v. Denver, 210 U. S. (1908) 373 at 386, 52 L. ed. 1103, 1113. There is an excellent illustration of this in the recent case of Cooke v. United States, 267 U. S. (1925) 517, 69 L. ed. 767, where the court held that a notice containing charges and a reasonable opportunity for hearing with the assistance of counsel must be provided in contempt cases where the contempt was not committed in the presence of the court. If the contempt were committed in the court room such procedure need not be followed. See also Ex parte Dawes, 239 Pac. (Okla. Cr., 1925) 689.

[40] Prentis v. Atlantic Coast Line Co., 211 U. S. (1908) 210, 53 L. ed. 150.

[41] Ernst Freund, Police Power (Chicago, 1903), secs. 520-528. See the significant language in State ex rel. v. Brown, 105 Ohio St. (1922) 479, 138 N. E. 230.

sity of the destruction.[42] It is significant that while this hearing need not be before the abatement of the nuisance in cases of overwhelming necessity,[43] there must be both

[42] "A determination on the part of the seizing officers that food is in an unfit condition to be eaten is not a decision which concludes the owner. The *ex parte* finding of the health officers as to the fact is not in any way binding upon those who own or claim the right to sell the food. If a party can not get his hearing in advance of the seizure and destruction he has the right to have it afterward, which right may be claimed upon the trial in an action brought for the destruction of his property, and in that action those who destroyed it can only successfully defend if the jury shall find the fact of the unwholesomeness as claimed by them." North American Cold Storage Co. v. Chicago, 211 U. S. (1908) 306, 53 L. ed. 195. See also: Title G. & S. Co. v. Idaho, 240 U. S. (1916) 136, 60 L. ed. 566; Samuels v. McCurdy, 267 U. S. (1925) 188, 69 L. ed. 568; Beach v. Trudgain, 2 Gratt. (Va., 1845) 219; Hale v. Lawrence, 21 N. J. L. (1848) 714, 47 Am. Dec. 190; Reynolds v. Schultz, 34 How. Pr. (1867) 147, 27 N. Y. S. 282; Salem v. Eastern R. Co., 98 Mass. (1868) 431, 96 Am. Dec. 650; Hutton v. Camden, 39 N. J. L. (1876) 122, 23 Am. Rep. 203; Waye v. Thompson, 15 Q. B. D. (1885) 342; Pearson v. Zehr, 138 Ill. (1891) 48, 29 N. E. 854, 32 Am. St. 113; Miller v. Horton, 152 Mass. (1891) 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. 850; Deems v. Baltimore, 80 Md. (1894) 164, 30 Atl. 648, 26 L. R. A. 541, 45 Am. St. 339; Lowe v. Connoy, 120 Wis. (1904) 151, 97 N. W. 942; East Tennessee Brew. Co. v. Currier, 126 Tenn. (1912) 535, 150 S. W. 541.

[43] Lawton v. Steele, 152 U. S. (1894) 135, 38 L. ed. 388; Sentell v. New Orleans &c. R. Co., 166 U. S. (1897) 705, 41 L. ed. 1172; Buttfield v. Stranahan, 192 U. S. (1904) 470, 48 L. ed. 525; Adams v. Milwaukee, 228 U. S. (1911) 570, 57 L. ed. 971; Perley v. North Carolina, 249 U. S. (1919) 510, 63 L. ed. 735; Maguire v. Reardon, 255 U. S. (1921) 271, 65 L. ed. 625; Cantini v. Tillman, 54 Fed. (1893) 969; Ashon v. Board of Commrs., 185 Fed. (1911) 221; Spalding v. Preston, 21 Vt. (1848) 9, 50 Am. Dec. 68; Conwell v. Emrie, 2 Ind. (1850) 35; American Print Wks. v. Lawrence, 23 N. J. L. (1850) 9, 590, 57 Am. Dec. 420; Commonwealth v. Albro, 1 Gray (67 Mass., 1854) 1; Reynolds v. Schultz, 27 N. Y. Super. (1867) 282, 34 How. Pr. 147; Salem v. Eastern R. Co., 98 Mass. (1868) 431, 96 Am. Dec. 650; Blazier v. Miller, 10 Hun (N. Y., 1877) 435; Wilcox v. Hemming, 58 Wis. (1883) 144, 15 N. W. 435, 46 Am. Rep. 625; Chambers v. Gilbert, 17 Tex. Civ. App. (1895) 106, 42 S. W. 630; Board of Police Commrs. v. Wagner, 93 Md. (1901) 182, 48 Atl. 455, 52 L. R. A. 775, 86 Am. St. 423; Cartwright v. Cohoes, 165 N. Y. (1901) 631, 59 N. E. 1120; Garland Novelty Co. v. State, 71 Ark. (1902) 138, 71 S. W. 257; State v. Derry, 171 Ind. (1908) 18, 85 N. E. 765; Meadows v. Gulf &c. R. Co., 48 Tex. Civ. App. (1908) 466, 107 S. W. 83; State v. Belle Springs Creamery Co., 83 Kans. (1910) 389, 111 Pac. 474; Balch v. Glenn, 85 Kans. (1911) 735, 119 Pac. 67; People v. Delaney, 130 N. Y. S. (1911) 833; Pittsburgh v. State, 180 Ind. (1913) 245, 102 N. E. 25; Waud v. Crawford, 160 Iowa (1913) 432, 141 N. W. 1041; Farley v. Liquors &c., 141 N. Y. S. (1913) 696; Colvill v. Fox, 51 Mont. (1915) 72, 149 Pac. 496; Williams v. Sandles, 93 Ohio St. (1915) 92, 112 N. E. 206; Los Angeles v. Huntley, 84 Wash. (1915) 155, 146 Pac. 373; Louisiana State Board of Agr. & Immigr. v. Tanzmann, 140 La. (1917) 756, 73 So. 854; Herlihy v. Donohue, 52 Mont. (1917) 601, 161 Pac. 164; Stanley Liquor

summons and opportunity to be heard before damages can be assessed or costs levied.[44] Here again it is not necessary to comply with all the formalities of a judicial hearing. The defendant need not appear before the board; an opportunity for his appearance is all that is necessary.[45] The board may decide the matter largely on its own information,[46] rejecting certain evidence that it does not wish to consider;[47] and may even give a tentative judgment without a hearing,[48] which in some cases may be the final determination.[49]

Co. v. People, 63 Colo. (1917) 456, 168 Pac. 750; Runge v. Glerum, 37 N. Dak. (1917) 618, 164 N. W. 284; Stockwell v. State, 203 S. W. (Tex., 1918) 109; Maguire v. Reardon, 41 Cal. App. (1919) 596, 183 Pac. 303; Randall v. Patch, 118 Maine (1919) 303, 108 Atl. 97; In re Seven Barrels of Wine, 79 Fla. (1920) 1, 83 So. 627; State v. Killens, 149 Ga. (1920) 735, 101 S. E. 911; State v. Peterson, 107 Kans. (1920) 641, 193 Pac. 342; Jackson v. Bell, 143 Tenn. (1920) 452, 226 S. W. 207; Bowman v. Virginia State Entomologist, 128 Va. (1920) 351, 105 S. E. 141; Gemert v. Pooler, 171 Wis. (1920) 271, 177 N. W. 1; State v. Jackson, 152 La. (1922) 656, 94 So. 150; Finley v. Barker 219 Mich. (1922) 442, 189 N. W. 197; State v. Roy, 152 La. (1922) 933, 94 So. 703.

[44] Sheppard v. Johnson, 21 Tenn. (1841) 285; Philadelphia v. Scott, 81 Pa. (1876) 80, 22 Am. Rep. 738; Hutton v. Camden, 39 N. J. L. (1876) 122, 23 Am. Rep. 203; Gemert v. Pooler, 171 Wis. (1920) 271, 177 N. W. 1.

[45] Metropolitan Board of Health v. Heister, 37 N. Y. (1868) 661; In re Allen, 82 Vt. (1909) 365, 73 Atl. 1078. See also sec. 89, n. 33.

[46] People ex rel. v. Board of Health of Yonkers, 140 N. Y. (1893) 1, 35 N. E. 320.

[47] Tang Tun v. Edsell, 223 U. S. (1912) 681, 56 L. ed. 610; United States v. Hughes, 299 Fed. (1924) 99.

[48] Reynolds v. Schultz, 27 N. Y. Super. (1867) 282, 34 How. Pr. 147.

[49] Where it would endanger the health of the individual to require her to appear. Simon v. Craft, 182 U. S. (1901) 427, 45 L. ed. 1165. Cf Bushnell v. Leland, 164 U. S. (1897) 684, 41 L. ed. 598. But see also Randall v. Patch, 118 Maine (1919) 303, 108 Atl. 97.

For other cases of summary proceedings see: Bank of Columbia v. Okely, 4 Wheat. (U. S., 1919) 235, 4 L. ed. 559; Johnson v. Sayre, 158 U. S. (1895) 109, 39 L. ed. 915; Tinsley v. Anderson, 171 U. S. (1898) 101, 43 L. ed. 91; Jack v. Kansas, 199 U. S. (1905) 372, 50 L. ed. 235; American Land Co. v. Zeiss, 219 U. S. (1911) 47, 55 L. ed. 82; Michigan Trust Co. v. Ferry, 228 U. S. (1913) 346, 57 L. ed. 861; Bianchi v. Morales, 262 U. S. (1923) 170, 67 L. ed. 928; United States v. Dillin, 168 Fed. (1909) 813; United States v. Seventy-five Barrels of Vinegar, 192 Fed. (1911) 350; Thompson v. Nichols, 254 Fed. (1919) 973; Keeley v. Evans, 271 Fed. (1921) 520; Talvande v. Cripps, 3 McCord. (S. Car., 1821) 147; Cowles v. Britain, 9 N. Car. (1822) 204; Streeter v. Paton, 7 Mich. (1859) 341; Risser v. Hoyt, 53 Mich. (1862) 185; Woodruff v. Lobdell, 25 La. Ann. (1873) 658; Vaughan v. Furlong, 12 R. I. (1878) 127; In re Beebe, 20 Hun (N. Y., 1880) 462; Rider v. Regan, 114 Cal. (1896) 667; In re Roberts, 4 Kans. App. (1896) 292, 45 Pac. 942; In re Free-

On the other hand, in cases of quasi-legislative rulings, the courts have held that a notice and hearing are not essential to the validity of the proceedings.[50] But even here

man's Est., 181 Pa. St. (1897) 405, 37 Atl. 591, 59 Am. St. 659; People v. Gillespie, 48 N. Y. S. (1898) 882; Anderson v. Henry, 45 W. Va. (1898) 319, 31 S. E. 998; Sweeney v. Coulter, 109 Ky. 295, 58 S. W. 784, 22 Ky. L. R. 885; Tyler v. Judges, 175 Mass. (1900) 71, 55 N. E. 812, 51 L. R. A. 433; Chicago &c. R. Co. v. Keith, 12 Ohio Cir. Dec. (1900) 208, 21 Ohio C. C. 669; Church v. South Kingstown, 22 R. I. (1901) 381, 48 Atl. 3, 53 L. R. A. 759; Randall v. Gross, 67 Nebr. (1903) 255, 93 N. W. 223; In re Bell, 69 Kans. (1904) 855, 76 Pac. 1129; Garfield v. United States, 32 App. D. C. (1908) 109; Barrett v. Whitney, 36 Utah (1909) 574, 106 Pac. 522; Kalb-Gilbert Lumber Co. v. Cram, 57 Wash. (1910) 550, 107 Pac. 381; Fulton v. State, 171 Ala. (1911) 572, 54 So. 688; In re Cameron, 126 Tenn. (1912) 614, 151 S. W. 64; Gaulden v. Wright, 140 Ga. (1913) 800, 79 S. E. 1125; State v. Borstad, 27 N. Dak. (1914) 533, 147 N. W. 380; Armour Fertilizer Works v. Parrish Fruit Co., 63 Fla. (1915) 64, 58 So. 231; State v. Goodland, 159 Wis. (1915) 393, 150 N. W. 488; Oregon Lumber Co. v. East Fork Irrig. Dist., 80 Ore. (1916) 568, 157 Pac. 963; Huth v. Huth, 187 S. W. (Tex., 1916) 523; People v. Barbiere, 33 Cal. App. (1917) 770, 166 Pac. 812; Falender v. Atkins, 186 Ind. (1917) 455, 114 N. E. 965; Conover v. West Jersey Mfg. Co., 87 N. J. Eq. (1917) 16, 99 Atl. 604; Ashley v. Three Justices, 228 Mass. (1917) 63, 116 N. E. 961; Goodspeed v. Wayne Circuit Judge, 199 Mich. (1917) 273, 165 N. W. 943, 166 N. W. 899; Shaw v. Standard Piano Co., 87 N. J. Eq. (1917) 350, 100 Atl. 167; People ex rel. v. Sisson, 180 App. Div. (1917) 464, 166 N. Y. S. 801; Peck v. Linney, 97 Wash. (1917) 103, 165 Pac. 1080; Allen v. Williams, 31 Idaho (1918) 309, 171 Pac. 493; Copeland v. Wheelwright, 230 Mass. (1918) 131, 119 N. E. 667; Vineyard Co. v. District, 42 Nev. (1918) 1, 171 Pac. 166; Mallory v. Virginia Colony for Feeble-Minded, 123 Va. (1918) 205, 96 S. E. 172; Chase v. Proprietors, 232 Mass. (1919) 88, 122 N. E. 162; Biesantz v. Special Council of R. A., 106 Misc. (1919) 545, 175 N. Y. S. 46; Lambert v. National Hog Co., 263 Pa. (1919) 354, 106 Atl. 541; Ex parte Hardcastle, 84 Tex. Cr. (1919) 463, 208 S. W. 531; In re Benvenuto's Est., 183 Cal. (1920) 382, 191 Pac. 678; Ashton-Jenkins Co. v. Bramel, 56 Utah (1920) 587, 192 Pac. 375; Schemerhorn v. General Elec. Co., 195 App. Div. (1921) 670, 186 N. Y. S. 835; in re Collins, 188 Cal. (1922) 701, 206 Pac. 990; Bradshaw v. Hedrick, 294 Mo. (1922) 21, 241 S. W. 402; McWhorter v. Chattooga County, 154 Ga. (1922) 289, 114 S. E. 203; Klein v. Hutton, 191 N. W. (N. Dak., 1922) 485; Columbus Packing Co. v. State, 106 Ohio St. (1923) 469, 140 N. E. 376; Inland Finance Co. v. Ingersoll Co., 124 Wash. (1923) 72, 213 Pac. 679; DeYoung v. Koehler, 181 Wis. (1923) 415, 194 N. W. 490; Board of Commrs. of Guadalupe County v. Dist. Ct., 29 N. Mex. (1924) 244, 223 Pac. 516; Yee Hem v. United States, 268 U. S. (1925) 178, 69 L. ed. 904.

[50] Health Department v. Rector of Trinity Church, 145 N. Y. (1895) 32, 39 N. E. 833; Nelson v. State Board of Health, 186 Mass. (1904) 330, 71 N. E. 693; Commonwealth v. Sisson, 189 Mass. (1905) 247, 75 N. E. 619. See also: Giozza v. Tiernan, 148 U. S. (1893) 657, 37 L. ed. 600; Nutting v. Commrs. of Mass., 183 U. S. (1902) 553, 46 L. ed. 325; Wolf v. Lampkin, 198 U. S. (1905) 588 49 L. ed. 1175; Northwestern Nat. Life Ins. Co. v. Riggs, 203 U. S. (1906) 243, 51 L. ed. 168; Lemieux v. Young, 211 U. S. (1909) 489, 53 L. ed. 296; The J. W. French, 13 Fed.

when confronted with a difficult case, the courts, under the rule that all quasi-legislative acts must be reasonable, not infrequently take upon themselves to give a hearing subsequent to the administrative determination.[51] This is particularly true in those cases involving the fixing of rates. The courts have developed the doctrine that the question of the reasonableness of the rate is a judicial one and consequently a statute preventing a hearing before the court on this matter violates due process.[52] In hear-

(1882) 916; Ex parte Yung Jon, 28 Fed. (1886) 308; Stevens v. State, 2 Ark. (1839) 291, 35 Am. Dec. 72; Ingram v. State, 39 Ala. (1864) 247, 84 Am. Dec. 782; Badkins v. Robinson, 53 Ga. (1875) 613; Scott v. Brackett, 89 Ind. (1883) 413; American Ex. Co. v. People, 133 Ill. (1890) 649, 24 N. E. 758; Ex parte Maier, 103 Cal. (1894) 476, 37 Pac. 402; Prince v. Crocker, 166 Mass. (1896) 347, 44 N. E. 446, 32 L. R. A. 610; Third Nat. Bank v. Divine Gro. Co., 97 Tenn. (1896) 603, 37 S. W. 390, 34 L. R. A. 445; State v. Schlenker, 112 Iowa (1900) 642, 84 N. W. 698, 51 L. R. A. 347; Chase v. Trout, 146 Cal. (1903) 350, 80 Pac. 81; Given v. State, 160 Ind. (1903) 552, 66 N. E. 750; Ritter v. Drainage Dist. No. 1, 78 Ark. (1906) 580, 84 S. W. 711; Weed v. Bergh, 141 Wis. (1910) 569, 124 N. W. 664, 25 L. R. A. (N. S.) 1917; State v. Garness, 83 Wash. (1913) 699, 144 Pac. 929; Rauch v. Himmelberger, 305 Mo. (1924) 70, 264 S. W. 658; Tulsa v. Weston, 102 Okla. (1924) 222, 229 Pac. 108.

[51] E. g., The Japanese Immigrant Case, 189 U. S. (1902) 86, 47 L. ed. 721; Chin Yow v. United States, 208 U. S. (1908) 8, 52 L. ed. 369.

[52] Railroad Commn. Cases, 116 U. S. (1886) 307, 29 L. ed. 636; Chicago M. & St. P. R. Co. v. Minnesota, 134 U. S. (1890) 418, 33 L. ed. 970; Prentis v. Atlantic Coast Line R. Co., 211 U. S. (1908) 210, 53 L. ed. 150; Interstate Commerce Commission v. Northern Pac. R. Co., 216 U. S. (1910) 538, 54 L. ed. 608; Interstate Commerce Commn. v. Louisville &c. R. Co., 227 U. S. (1913) 88, 57 L. ed. 431.

But the court will try to construe the statute so as to permit appeals. Louisville &c. R. Co. v. Garrett, 231 U. S. (1913) 298, 58 L. ed. 229.

For other cases involving notice and hearing in matters of rate fixing see: Munn v. Illinois, 94 U. S. (1876) 113, 24 L. ed. 77; Peik v. Chicago & N. W. R. Co., 94 U. S. (1876) 164, 24 L. ed. 97; Winona & St. Pet. R. Co. v. Blake, 94 U. S. (1876) 180, 24 L. ed. 99; Georgia R. & Banking Co. v. Smith, 128 U. S. (1888) 178, 179, 32 L. ed. 380; Reagan v. Farmers Loan & T. Co., 154 U. S. (1894) 389, 390, 38 L. ed. 1021; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. (1899) 686, 687, 43 L. ed. 860; San Diego Land & T. Co. v. National City, 174 U. S. (1899) 750, 752, 43 L. ed. 1159; Cotting v. Godard, 183 U. S. (1901) 79, 46 L. ed. 92; McChord v. Louisville & N. R. Co., 183 U. S. (1902) 483, 46 L. ed. 289; Louisville & N. R. Co. v. Kentucky, 183 U. S. (1902) 503, 46 L. ed. 298; Tampa Waterworks Co. v. Tampa, 199 U. S. (1905) 241, 50 L. ed. 172; Ex parte Young, 209 U. S. (1908) 123, 52 L. ed. 714; Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. (1908) 265, 53 L. ed. 176; Willcox v. Consolidated Gas Co., 212 U. S. (1909) 19, 53 L. ed. 382; Missouri Pac. R. Co. v. Nebraska, 217 U. S. (1910) 196, 54 L. ed. 727; Hooker v. Knapp, 225 U. S. (1912) 302, 56 L. ed. 1099; Portland R., Light & P. Co. v. Railroad Commn., 229

ing the case the court reserves to itself the right to arrive

U. S. (1913) 397, 57 L. ed. 1248; Missouri Pac. R. Co. v. Tucker, 230 U. S. (1913) 340, 57 L. ed. 1507; Minnesota Rate Cases, 230 U. S. (1913) 352, 57 L. ed. 1511; German Alliance Ins. Co. v. Lewis, 233 U. S. (1914) 389, 58 L. ed. 1011; Louisville &c. R. Co. v. Finn, 235 U. S. (1914) 601, 59 L. ed. 379; Wadley Southern R. Co. v. Georgia, 235 U. S. (1915) 651, 59 L. ed. 405; Gulf, C. &c. R. Co. v. Texas, 246 U. S. (1918) 58, 62 L. ed. 574; Detroit & M. R. Co. v. Fletcher Paper Co., 248 U. S. (1918) 30, 63 L. ed. 107; Groesbeck v. Duluth S. S. & A. R. Co., 250 U. S. (1919) 607, 63 L. ed. 1167; St. Louis, I. M. &c. R. Co. v. Williams, 251 U. S. (1919) 63, 64 L. ed. 139; Great Northern R. Co. v. Cahill, 253 U. S. (1920) 71, 64 L. ed. 787; Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. (1920) 287, 64 L. ed. 908; Levy Leasing Co. v. Siegel, 258 U. S. (1920) 242, 66 L. ed. 595; Wichita R. & Light Co. v. Public Util. Commn., 260 U. S. (1922) 48, 67 L. ed. 124; New York v. United States, 257 U. S. (1922) 591, 66 L. ed. 385; Akron, C. &c. R. Co. v. United States, 261 U. S. (1923) 184, 67 L. ed. 605; Missouri ex rel. v. Public Serv. Commn., 262 U. S. (1923) 276, 67 L. ed. 981; Dayton-Goose Creek R. Co. v. United States, 263 U. S. (1924) 456, 68 L. ed. 388; United States v. Illinois Cent. R. Co., 263 U. S. (1924) 515, 68 L. ed. 417; Tilley v. Savannah, F. &c. R. Co., 5 Fed. (1881) 641; Spring Valley Water Works v. Bartlett, 16 Fed. (1883) 615; Louisville &c. R. Co. v. Railroad Commn. of Tennessee, 19 Fed. (1884) 679; Chicago, M. &c. R. Co. v. Becker, 32 Fed. (1887) 851, 854; Mercantile Trust Co. v. Texas & P. R. Co., 51 Fed. (1892) 529, 541; Clyde v. Richmond & D. R. Co., 57 Fed. (1893) 436, 439; Southern Pac. R. Co. v. Board of Commrs., 78 Fed. (1896) 236, 258; Milwaukee Elec. R. & Light Co. v. Milwaukee, 87 Fed. (1898) 577; San Diego Land & Town Co. v. Jasper, 89 Fed. (1898) 274; Western Union Tel. Co. v. Myatt, 98 Fed. (1899) 335; Trammell v. Dinsmore, 102 Fed. (1900) 794, 800; Louisville & N. R. Co. v. McChord, 103 Fed. (1900) 216; Spring Valley Water Works v. San Francisco, 124 Fed. (1903) 574; Love v. Atchison, T. &c. R. Co., 185 Fed. (1911) 321; Louisville & N. R. Co. v. Siler, 186 Fed. (1911) 176; Louisville & N. R. Co. v. Railroad Commn., 196 Fed. (1912) 800; Central of Georgia R. Co. v. Railroad Commn., 209 Fed. (1914) 75; Central of Georgia R. Co. v. Railroad Commn., 215 Fed. (1914) 421; Manufacturers' Light & Heat Co. v. Ott, 215 Fed. (1914) 940; Southern Pacific Co. v. California Adjust. Co., 237 Fed. (1917) 954; Doherty v. Toledo R. & Light Co., 254 Fed. (1918) 597; Wisconsin-Minnesota Light & Power Co. v. Railroad Commn., 267 Fed. (1920) 711; Birmingham Tr. & Sav. Co. v. Atlanta B. &c. R. Co., 271 Fed. (1921) 731; Public Serv. R. Co. v. Public Util. Commrs., 276 Fed. (1921) 979; Karrick v. Cantrill, 277 Fed. (1922) 578; Jacksonville Gas Co. v. Jacksonville, 286 Fed. (1923) 404; Cumberland Telephone & Telegraph Co. v. Railroad & Pub. Util. Commn., 287 Fed. (1921) 406; United States v. Oklahoma Gas & Elec. Co., 297 Fed. (1924) 575; Hockett v. State, 105 Ind. (1885) 250, 5 N. E. 178; People v. Budd, 117 N. Y. (1889) 1, 22 N. E. 670, 682; Burlington C. R. &c. R. Co. v. Dey, 82 Iowa (1891) 312, 48 N. W. 98; State v. Edwards, 86 Maine (1893) 102, 29 Atl. 947; Chicago, B. &c. R. Co. v. Jones, 149 Ill. (1894) 361, 37 N. E. 247; State ex rel. v. Sioux City, O. &c. R. Co., 46 Nebr. (1895) 682, 65 N. W. 766; Wilson v. United Trac. Co., 72 App. Div. (1902) 233, 76 N. Y. S. 203; Tampa v. Tampa Water Works Co., 45 Fla. (1903) 600, 34 So. 631; Back River Neck Tpk. Co. v. Homberg, 96 Md. (1903) 430, 54 Atl. 82; Ohio Tpk. Co. v. Waechter, 25 Ohio C. C. (1903) 605; Grossman v. Consoli-

at an independent judgment of both the law and facts.[53] It seems therefore that there is a tendency of the court to demand, in the interest of inherent justice, that all bodies inferior to itself should operate only under the traditional safeguards of notice and hearing, which in some cases must be judicial in nature.[54] In this class of cases the courts tend to return to the protections of private right which were found to be successful at common law.

§ 91. There are certain types of determinations, however, in which a notice or hearing, or even both, may be

dated Gas Co., 186 N. Y. (1905) 541, 78 N. E. 1104; Richman v. Consolidated Gas Co., 186 N. Y. (1906) 209, 78 N. E. 871; Ratcliff v. Wichita Union Stockyards Co., 74 Kans. (1906) 1, 86 Pac. 150; Brymer v. Butler Water Co., 179 Pa. St. (1897) 231, 36 Atl. 249, 36 L. R. A. 260; McGrew v. Missouri Pac. R. Co., 230 Mo. (1910) 496, 132 S. W. 1076; Illinois Central R. Co. v. Paducah Brewery Co., 157 Ky. (1914) 357, 163 S. W. 239; State ex rel. v. Howard, 96 Nebr. (1914) 278, 147 N. W. 689; Turner Creamery Co. v. Chicago, M. &c. R. Co., 36 S. Dak. (1915) 310, 154 N. W. 819; State Public Util. Commn. ex rel. v. Chicago &c. R. Co., 275 Ill. (1917) 555, 114 N. E. 325; Bronx Gas & Elec. Co. v. Public Serv. Commn., 190 App. Div. (1919) 13, 180 N. Y. S. 38; New York & Pennsylvania Co. v. New York Cent. R. Co., 267 Pa. St. (1920) 64, 110 Atl. 286; Hocking Valley R. Co. v. Public Util. Commn., 100 Ohio St. (1920) 321, 126 N. E. 397; People ex rel. v. La Fetra, 230 N. Y. (1920) 429, 130 N. E. 601; In re Island Falls Water Co., 118 Maine (1920) 397, 108 Atl. 459; Mill Creek Coal & Coke Co. v. Public Serv. Commn., 84 W. Va. (1920) 662, 100 S. E. 557; Law v. Railroad Commn., 184 Cal. (1921) 737, 195 Pac. 423; Rumbo v. Winterrowd (Tex. Civ. App., 1921), 228 S. W. 258; New Jersey Cent. Trac. Co. v. Public Util. Commrs., 96 N. J. L. (1921) 90, 113 Atl. 692; Northern Illinois Light & Trac. Co. v. Commerce Commn., 302 Ill. (1922) 11, 134 N. E. 142; In re Yeiser, 110 Nebr. (1923) 65, 192 N. W. 953; Southern Utils. Co. v. Palatka, 99 So. (Fla., 1924) 236; Edwardsville v. Illinois Bell Tel. Co., 310 Ill. (1924) 618, 142 N. E. 197; Clear Creek Oil & Gas Co. v. Forth Smith Spelter Co., 255 S. W. (Ark., 1924) 903; In re Smith, 193 Cal. (1924) 337, 223 Pac. 971; In re Boynton, 193 Cal. (1924) 782, 223 Pac. 972; Shealy v. Seaboard Air Line R. Co., 131 S. Car. (1925) 144, 126 S. E. 622.

[53] See in addition to the cases in note *supra:* Smyth v. Ames, 169 U. S. (1898) 466, 42 L. ed. 819; Washington ex rel. v. Fairchild, 224 U. S. (1912) 510, 56 L. ed. 863; Bluefield Waterworks & Improvement Co. v. Public Service Commn. of West Virginia, 262 U. S. 679, 67 L. ed. 1176.

[54] "The question of reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring the process of law for its determination." Justice Blatchford, Chicago, M. &c. R. Co. v. Minnesota, 134 U. S. (1890) 418, 458, 33 L. ed. 972. See also Washington ex rel. v. Fairchild, 224 U. S. (1912) 510, 56 L. ed. 863; Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. (1919) 287.

dispensed with entirely. If it can be shown that there is nothing on which a notice and hearing would be appropriate and that the determination is purely a ministerial one the courts have pointed out that to insist on this formality merely delays justice and is of no real value in protecting private rights. This was decided first in cases of the levy of specific taxes where there was no question of value,[55] and subsequently when licenses were to be revoked due to events beyond the control of the board,[56] or land titles were to revert to the state when those purchasing public lands defaulted in their payments.[57] The second class of cases not requiring notice and hearing are

[55] Hagar v. Reclamation Dist. No. 108, 111 U. S. (1884) 701, 28 L. ed. 569; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. (1890) 232, 33 L. ed. 892. See also sec. 89, n. 34.

[56] Martin v. State, 23 Nebr. (1888) 371, 36 N. W. 554; People ex rel. v. Department of Health, 189 N. Y. (1907) 187, 82 N. E. 187; Kaiser Land & Fruit Co. v. Curry, 155 Cal. (1909) 638, 103 Pac. 341.

See also in regard to the revocation of licenses: State v. Burgoyne, 7 Lea (Tenn., 1881) 173, 40 Am. Rep. 60; Kresser v. Lyman, 74 Fed. (1896) 765, 766; State Board of Health v. Roy, 22 R. I. (1901) 538, 539, 48 Atl. 802; Mathews v. Hedlund, 82 Nebr. (1908) 825, 119 N. W. 17; Chenoweth v. State Board of Medical Examrs., 57 Colo. (1913) 74, 141 Pac. 132; Cutsinger v. Atlanta, 142 Ga. (1914) 555, 83 S. E. 263; Vincent v. Seattle, 115 Wash. (1921) 475, 197 Pac. 618; Davis v. Calderwood, 146 N. E. (Mass., 1925) 708; Northern Cedar Co. v. French, 131 Wash. (1925) 394, 230 Pac. 837; Brein v. Connecticut Elec. Exam. Board, 130 Atl. (Conn., 1925) 289.

[57] Wilson v. Standefer, 184 U. S. (1902) 399, 46 L. ed. 612.

Other cases on the reversion of land titles are: Palmer v. McMahon, 133 U. S. (1890) 660, 33 L. ed. 772; Western Union Tel. Co. v. Indiana, 165 U. S. (1897) 304, 41 L. ed. 725; King v. Mullins, 171 U. S. (1898) 404, 43 L. ed. 214; Swann v. West Virginia, 188 U. S. (1903) 739, 47 L. ed. 677; Kentucky Union Co. v. Commn. of Ky., 219 U. S. (1911) 140, 55 L. ed. 137; Bankers Trust Co. v. Blodgett, 260 U. S. (1923) 647, 67 L. ed. 439; King v. Hatfield, 130 Fed. (1900) 564; Myers v. Park, 55 Tenn. (1875) 550; State v. Jersey City, 37 N. J. L. (1874) 39; Marshall v. McDaniel, 75 Ky. (1876) 378; Bartlett v. Wilson, 59 Vt. (1887) 23, 8 Atl. 321; State v. Sponaugle, 45 W. Va. (1898) 415, 32 S. E. 283; State v. Cheney, 45 W. Va. (1898) 478, 31 S. E. 920; Shaw v. Robinson, 111 Ky. (1901) 715, 64 S. W. 620; Parish v. East Coast Cedar Co., 133 N. Car. (1903) 478, 45 S. E. 768; J. L. Roper Lumber Co. v. Elizabeth City Lumber Co., 135 N. Car. (1904) 742, 47 S. E. 757; Webb v. Ritter, 60 W. Va. (1906) 193, 54 S. E. 484; State v. King, 64 W. Va. (1908) 546, 63 S. E. 468; Board of Commrs. v. Clinton, 49 Okla. (1916) 795, 154 Pac. 513; Meulenbergh v. Coe, 160 N. Y. S. (1916) 581.

When the action of the administrative body is merely formal no hearing need be provided. Columbia v. Shaw, 131 S. Car. (1925) 462, 127 S. E. 722.

those in which the state has an arbitrary or proprietary control over the matter. Thus the courts hold that officers may be removed from public offices,[58] licenses to operate saloons and pool halls may be revoked,[59] immi-

[58] Wilcox v. People, 90 Ill. (1878) 186; People ex rel. v. Whitlock, 92 N. Y. (1883) 191; Gray v. McLendon, 134 Ga. (1910) 224, 67 S. E. 859; Ekern v. McGovern, 154 Wis. (1913) 157, 142 N. W. 595; State ex rel. v. Frazier, 39 N. Dak. (1918) 430, 167 N. W. 510; Boyd v. Pendegast, 57 Cal. App. (1922) 504, 207 Pac. 713. See also: Foster v. Kansas, 112 U. S. (1884) 206, 28 L. ed. 697; Wilson v. North Carolina, 169 U. S. (1898) 592, 42 L. ed. 869; Reaves v. Ainsworth, 219 U. S. (1911) 296, 55 L. ed. 225; Attorney General v. Jochim, 99 Mich. (1894) 358, 58 N. W. 611; Caldwell v. Wilson, 121 N. Car. (1897) 425, 28 S. E. 554; Lowrey v. Central Falls, 23 R. I. (1901) 354, 50 Atl. 639; Preston v. Chicago, 246 Ill. (1910) 26, 92 N. E. 591; People ex rel. v. Nellis, 249 Ill. (1911) 12, 94 N. E. 165; Edge v. Holcomb, 135 Ga. (1911) 765, 70 S. E. 644; Darmstatter v. Passaic, 81 N. J. L. (1911) 162, 79 Atl. 545; Attorney General v. Pelletier, 240 Mass. (1922) 264, 134 N. E. 407.

[59] Commonwealth v. Kinsley, 133 Mass. (1882) 578; Martin v. State, 23 Nebr. (1888) 371; Krueger v. Colville, 49 Wash. (1908) 295, 95 Pac. 81. Unless the revocation requires an act which is essentially judicial. Balling v. Elizabeth Board of Excise, 79 N. J. L. (1909) 197, 74 Atl. 277.

Other cases dealing with forfeiture procedure are: Passavant v. United States, 148 U. S. (1893) 214, 37 L. ed. 426; National Cotton Oil Co. v. Texas, 197 U. S. (1905) 115, 49 L. ed. 689; Marvin v. Trout, 199 U. S. (1905) 212, 50 L. ed. 157; Hammond &c. Co. v. Arkansas, 212 U. S. (1907) 322, 53 L. ed. 530; St. Louis &c. R. Co. v. Williams, 251 U. S. (1920) 63, 64 L. ed. 139; Oklahoma Operating Co. v. Love, 252 U. S. (1920) 331, 64 L. ed. 596; Hartford Life Ins. Co. v. Blincoe, 255 U. S. (1921) 129, 65 L. ed. 549; Chicago &c. R. Co. v. Nye-Schneider-Fowler Co., 260 U. S. (1923) 35, 67 L. ed. 115; Security Sav. Bank v. State, 263 U. S. (1924) 282, 68 L. ed. 301; Central of Georgia R. Co. v. Macon, 110 Fed. (1901) 865; International Mercantile Marine Co. v. Stranahan, 155 Fed. (1909) 428; Thome v. Lynch, 269 Fed. (1921) 995; Chicago & N. W. R. Co. v. Railroad and Warehouse Commn. of Minnesota, 280 Fed. (1922) 387; United States v. One Buick Roadster, 280 Fed. (1922) 517; State v. Allen, 2 McCord (S. Car., 1822) 55; McFarland v. McKnight, 45 Ky. (1846) 500; Ex parte Nightingale, 12 Fla. (1868) 272; Branch v. Wilmington &c. R. Co., 77 N. Car. (1877) 347; Commonwealth v. Avery, 77 Ky. (1879) 625, 29 Am. Rep. 429; State v. Ferguson, 69 Mo. (1879) 495; Burkholder v. Union Tr. Co., 82 Mo. (1884) 572; Marmet v. State, 45 Ohio St. (1887) 63, 12 N. E. 463; Black v. Stein, 23 Nebr. (1888) 302, 36 N. W. 548; Orange County v. Harris, 97 Cal. (1893) 600, 32 Pac. 594; McBride v. State Revenue Agent, 70 Miss. (1893) 716, 12 So. 699; Union Cent. Life Ins. Co. v. Chowning, 86 Tex. (1894) 654, 26 S. W. 982; Dittman Boot & Shoe Co. v. Mixon, 120 Ala. (1898) 206, 24 So. 847; Judy v. Thompson, 156 Ind. (1901) 533, 60 N. E. 270; Meacham v. Bear Valley Irr. Co., 145 Cal. (1904) 606, 79 Pac. 281; Tarr v. Oregon Short Line R. Co., 14 Idaho (1908) 192, 93 Pac. 957, 125 Am. St. 151; Louisville School Board v. King, 127 Ky. (1908) 824, 107 S. W. 247; Berry v. DeMaris, 76 N. J. L. (1908) 301, 70 Atl. 337; Wichita Elec. Co. v. Hinckley, 131 S. W. (Tex. Civ. App., 1910) 1192; Hawkins v. Langum, 115 Minn.

grants may be denied admission,[60] and the steamship companies which brought them to our shores may be fined

(1911) 100, 131 N. W. 1014; State v. Marshall, 100 Miss. (1911) 626, 56 So. 792; State v. Blaisdell, 22 N. Dak. (1911) 86, 132 N. W. 769; Southern R. Co. v. Lowe, 139 Ga. (1913) 362, 77 S. E. 44; Klafter v. State Board Examrs. of Architects, 259 Ill. (1913) 15, 102 N. E. 193; Eastman v. Jennings &c., 69 Ore. (1914) 1, 138 Pac. 216; Greene v. San Antonio, 178 S. W. (Tex. Civ. App., 1915) 6; Barber v. Hartford Life Ins. Co., 269 Mo. (1916) 21, 187 S. W. 867; Boerner v. Thompson, 278 Ill. (1917) 153, 115 N. E. 866; Hamblin v. Marchant, 103 Kans. (1918) 508, 175 Pac. 678; Sperry & Hutchinson Co. v. Weigle, 166 Wis. (1918) 613, 166 N. W. 54; Maples v. State, 203 Ala. (1919) 153, 82 So. 183; Mack v. Westbrook, 148 Ga. (1919) 690, 98 S. E. 339; Whitley v. Stephens, 184 Ky. (1919) 277, 211 S. W. 770; United States Fid. & Guar. Co. v. Wickline, 103 Nebr. (1919) 21, 170 N. W. 193; Florida East Coast R. Co. v. State, 79 Fla. (1920) 66, 83 So. 708; State v. Killens, 149 Ga. (1920) 735, 101 S. E. 911; Mobile &c. R. v. Jobe, 122 Miss. (1920) 696, 84 So. 910; Bronx Gas & Elec. Co. v. Public Serv Commn., 108 Misc. (1920) 180, 178 N. Y. S. 172; Oklahoma Gin Co. v. State, 158 Pac. (Okla., 1920) 629; Germantown Trust Co. v. Powell, 265 Pa. (1920) 71, 108 Atl. 441; State v. Savings Union Bank & Tr. Co., 186 Cal. (1921) 294, 199 Pac. 26; State v. Stephens, 109 Kans. (1921) 254, 198 Pac. 1087; Bunkley v. Commonwealth, 130 Va. (1921) 55, 108 S. E. 1; Oklahoma Nat. Gas Co. v. State, 78 Okla. (1922) 5, 188 Pac. 338; People v. Diamond, 199 App. Div. (1922) 497, 192 N. Y. S. 60; Spry v. Freeman, 85 Okla. (1922) 119, 204 Pac. 1104; Beckler Produce Co. v. American Ry. Exp. Co., 156 Ark. (1923) 296, 246 S. W. 1; Aetna Ins. Co. v. Robertson, 131 Miss. (1923) 343, 94 So. 7, 95 So. 137; Grier v. Kansas City &c. R. Co., 254 S. W. (Mo., 1923) 359; DeWitt v. State ex rel., 108 Ohio St. (1924) 513, 141 N. E. 551; Babcock v. Harrsch, 310 Ill. (1924) 413, 141 N. E. 701.

[60] Nishimura Ekiu v. United States, 142 U. S. (1892) 651, 35 L. ed. 1146; Fong Yue Ting v. United States, 149 U. S. (1893) 698, 37 L. ed. 905; Lem Moon Sing v. United States, 158 U. S. (1895) 538, 39 L. ed. 1082; United States v. Ju Toy, 198 U. S. (1905) 253, 49 L. ed. 1040; Zakonaite v. Wolf, 226 U. S. (1912) 272, 57 L. ed. 218. This rule does not apply to deportation of aliens domiciled here. Yamataya v. Fisher, 189 U. S. (1902) 86, 47 L. ed. 721; Ng Fung Ho v. White, 259 U. S. (1922) 276, 66 L. ed. 938; Ungar v. Seaman, 4 Fed. (2d) (1925) 80.

On the general question of deportation and exclusion see: Nishimura Ekiu v. United States, 142 U. S. (1892) 651, 35 L. ed. 1146; Fong Yue Ting v. United States, 149 U. S. (1893) 698, 37 L. ed. 905; Lees v. United States, 150 U. S. (1893) 476, 37 L. ed. 1150; Lem Moon Sing v. United States, 158 U. S. (1895) 538, 39 L. ed. 1082; Li Sing v. United States, 180 U. S. (1901) 486, 45 L. ed. 634; Chin Bak Kan v. United States, 186 U. S. (1902) 193, 46 L. ed. 1121; Japanese Immigrant Case, 189 U. S. (1902) 86, 47 L. ed. 721; Ah How v. United States, 193 U. S. (1904) 65, 48 L. ed. 619; United States v. Sing Tuck, 194 U. S. (1904) 161, 48 L. ed. 917; United States ex rel. v. Williams, 194 U. S. (1904) 279, 48 L. ed. 979; United States v. Coe, 196 U. S. (1905) 635, 49 L. ed. 629-632; United States v. Ju Toy, 198 U. S. (1905) 253, 49 L. ed. 1040; Liu Hop Fong v. United States, 209 U. S. (1908) 453, 52 L. ed. 888; United States v. Wong You, 223 U. S. (1912) 67, 56 L. ed. 354; Tang Tun v. Edsell, 223 U. S. (1912) 673, 56 L. ed. 606; Haw Moy v. North, 223 U. S. (1910)

without notice and hearing.[61] The aversion of the courts to this summary procedure is shown, however, by the fact that most of them will construe statutes providing for removal from office strictly, and if possible will infer that a notice and hearing are required.[62]

Closely connected with the subject of notice and hearing is the right of appeal. It has frequently been held that due process of law is not violated merely because the decision in the lower court was erroneous.[63] One hearing

717, 56 L. ed. 621-641; Low Wah Suey v. Backus, 225 U. S. (1912) 460, 56 L. ed. 1165; Zakonaite v. Wolf, 226 U. S. (1912) 272, 57 L. ed. 218; Choy Gum v. Backus, 239 U. S. (1915) 649, 60 L. ed. 473-489; Ng Fung Ho v. White, 259 U. S. (1922) 276, 66 L. ed. 938; In re Ah Fong, 3 Saw. (U. S., 1874) 144, Fed Cas. No. 102; In re Mah Wong Gee, 47 Fed. (1891) 433; United States v. Hing Quong Chow, 53 Fed. (1892) 233; In re Ng Loy Hoe, 53 Fed. (1892) 914; In re Yamasaka, 95 Fed. (1899) 652; In re Moy Quong Shing, 125 Fed. (1903) 641; In re Sing Tuck, 126 Fed. (1903) 386; Low Foon Yin v. United States, 145 Fed. (1906) 791; United States v. Ngum Lun May, 153 Fed. (1907) 209; United States v. Hemet, 156 Fed. (1907) 285; Waterhouse v. United States, 159 Fed. (1908) 876; Ex parte Hamaguchi, 161 Fed. (1908) 185; Ex parte Lung Wing Wun, 161 Fed. (1908) 211; Ex parte Crawford, 165 Fed. (1908) 830; In re Can Pon, 168 Fed. (1909) 479; Ex parte Li Dick, 176 Fed. (1910) 998; In re Chin Wah, 182 Fed. (1910) 256; Sire v. Berkshire, 185 Fed. (1911) 967; Ex parte Pouliot, 196 Fed. (1912) 437; United States v. Hom Lim, 214 Fed. (1914) 456; Ex parte Hidekuni Iwata, 219 Fed. (1915) 610; Healy v. Backus, 221 Fed. (1915) 358; Whitfield v. Hanges, 222 Fed. (1915) 745; Ex parte Chin Quock Wah, 224 Fed. (1915) 138; Lopez v. Howe, 259 Fed. (1919) 401; Ex parte Pettine, 259 Fed. (1919) 733; Colyer v. Skeffington, 265 Fed. (1920) 17; Ex parte Kwock Seu Lum, 287 Fed. (1923) 363; United States v. Dunton, 297 Fed. (1924) 447. See also n. 51.

A fine or imprisonment cannot be imposed upon an alien illegally in the United States except by judicial process. Wong Wing v. United States, 163 U. S. (1896) 228, 41 L. ed. 140; Li Sing v. United States, 180 U. S. (1901) 486, 45 L. ed. 634; In re Ah Yuk, 53 Fed. (1893) 781; United States v. Wong Dep Ken, 57 Fed. (1893) 206.

[61] Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. (1909) 320, 53 L. ed. 1013. See also: Buttfield v. Stranahan, 192 U. S. (1904) 470, 48 L. ed. 525; Buttfield v. Bidwell, 192 U. S. (1904) 498, 48 L. ed. 536; Buttfield v. United States, 192 U. S. (1904) 499, 48 L. ed. 537.

[62] Dullam v. Willson, 53 Mich. (1884) 392, 19 N. W. 112; People ex rel. v. Morton, 148 N. Y. (1896) 156, 42 N. E. 538; Ekern v. McGovern, 154 Wis. (1913) 157, 142 N. W. 595. See also n. 58, and sec. 101, n. 21, 22.

[63] Walker v. Sauvinet, 92 U. S. (1875) 90, 23 L. ed. 678; Arrowsmith v. Harmoning, 118 U. S. (1886) 194, 30 L. ed. 243; In re Converse, 137 U. S. (1891) 624, 34 L. ed. 796; Central Land Co. v. Laidley, 159 U. S. (1895) 103, 40 L. ed. 91; Backus v. Fort St. Union Depot Co., 169 U. S. (1898) 557, 42 L. ed. 853; Wilson v. North Carolina, 169 U. S. (1898) 586, 42 L. ed. 865; Howard v. Kentucky, 200 U. S. (1906) 164, 50 L. ed.

is all that is necessary, provided that one be fair and impartial. It therefore follows that due process does not guarantee a right to appeal to a higher court.[64] The state

421; Ballard v. Hunter, 204 U. S. (1907) 241, 51 L. ed. 461; Tracey v. Ginzberg, 205 U. S. (1907) 170, 51 L. ed. 755; Patterson v. Colorado ex rel., 205 U. S. (1907) 454, 51 L. ed. 879; Delmar Jockey Club v. Missouri ex rel., 210 U. S. (1907) 324, 52 L. ed. 1080; Bonner v. Gorman, 213 U. S. (1909) 86, 53 L. ed. 709; O'Neil v. Northern Colorado Irrig. Co., 242 U. S. (1916) 20, 61 L. ed. 123; Milwaukee Elec. R. & L. Co. v. Wisconsin ex rel., 252 U. S. (1920) 100, 64 L. ed. 476; In re King, 46 Fed. (1891) 905; Fayerweather v. Ritch, 91 Fed. (1899) 721; Filer v. Steele, 228 Fed. (1916) 242; Queens Land Co. v. Kings County Trust Co., 255 Fed. (1918) 222; State v. Orfanakis, 22 N. Mex. (1916) 107, 159 Pac. 674; McCray v. Miller, 78 Okla. (1920) 16, 184 Pac. 781, 186 Pac. 1089; Pacific Coats Coal Co. v. District No. 10, 122 Wash. (1922) 423, 210 Pac. 953; Woodward v. Killen, 148 N. E. (Ind., 1925) 195.

Nor will an error in an administrative decision necessarily violate due process: United States ex rel. v. Tod, 264 U. S. (1924) 131, 68 L. ed. 590. This rule, however, does not apply to a fraudulent decision. Ross v. Stewart, 227 U. S. (1913) 530 at 539, 57 L. ed. 626. Nor does it apply to a decision which is clearly partial. Jordan v. Massachusetts, 225 U. S. (1912) 167 at 176, 56 L. ed. 1038.

[64] McKane v. Durston, 153 U. S. (1894) 684, 38 L. ed. 867; Andrews v. Swartz, 156 U. S. (1895) 272, 39 L. ed. 422; Kohl v. Lehlback, 160 U. S. (1895) 293, 40 L. ed. 430; Allen v. Georgia, 166 U. S. (1897) 138, 41 L. ed. 949; Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. (1902) 437, 47 L. ed. 249; Reetz v. Michigan, 188 U. S. (1903) 505, 47 L. ed. 563; Rogers v. Peck, 199 U. S. (1905) 425, 50 L. ed. 256; United States v. Heinze, 218 U. S. (1910) 532, 54 L. ed. 1139; Standard Oil Co. v. Missouri ex rel., 224 U. S. (1912) 270, 56 L. ed. 760; Louisville &c. R. Co. v. Higdon, 234 U. S. (1914) 592, 58 L. ed. 1484; Lott v. Pittman, 243 U. S. (1917) 588, 61 L. ed. 915; Capital Tr. Co. v. Calhoun, 250 U. S. (1919) 208, 63 L. ed. 942; Applebaum v. United States, 256 U. S. (1921) 704, 65 L. ed. 1180; Hartford L. Ins. Co. v. Blincoe, 255 U. S. (1921) 129, 65 L. ed. 549; Alabama Power Co. v. Talmadge, 259 U. S. (1923) 575, 66 L. ed. 1071; Wagner Elec. Mfg. Co. v. Lyndon, 261 U. S. (1923) 614, 67 L. ed. 827; Tidal Oil Co. v. Flanagan, 263 U. S. (1924) 444, 68 L. ed. 382; In re Durrant, 84 Fed. (1898) 317, 319; Ex parte Januszewski, 196 Fed. (1912) 123; Teel v. Chesapeake &c. R. Co., 204 Fed. (1913) 918; Saint John v. United States, 268 Fed. (1920) 808; Haywood v. United States, 268 Fed. (1920) 795; Burch v. Newbury, 10 N. Y. (1852) 374; Chicago, B. &c. R. Co. v. Headrick, 49 Nebr. (1896) 286, 68 N. W. 489; Guthrie Nat. Bank v. McElhinney, 5 Okla. (1897) 107, 47 Pac. 1062; Adams v. Yazoo &c. R. Co., 77 Miss. (1898) 194, 24 So. 200, 317, 28 So. 596; San Jose Ranch Co. v. San Jose Land & Water Co., 126 Cal. (1899) 322, 58 Pac. 824; Cummings v. Chicago &c. R. Co., 189 Ill. (1901) 608, 609, 60 N. E. 51; Gunn v. Union R. Co., 23 R. I. (1901) 289, 49 Atl. 999; State ex rel. v. District of St. Louis Co., 90 Minn. (1903) 457, 97 N. W. 132; In re McPhee's Est., 154 Cal. (1908) 385, 97 Pac. 878; Green v. Red Cross Med. Serv. Co., 232 Ill. (1908) 616, 83 N. E. 1081; In re Sharp, 15 Idaho (1908) 120, 96 Pac. 563; Saylor v. Duel, 236 Ill. (1908) 429, 86 N. E. 119; Commonwealth v. Emmers, 221 Pa. (1908) 298, 70 Atl. 762; Speer v. Stephenson, 16 Idaho (1909) 707, 102 Pac. 365; Barber v. Vinton, 82

may even go so far as to permit appeals to the State Supreme Court from one part of the state while denying them from other sections.[65] Indeed, in some cases it has been held that an administrative body may be empowered to give final decisions without a right of appeal to the courts.[66] There is, however, one significant exception to

Vt. (1900) 327, 73 Atl. 881; Clay v. Clay, 56 Ore. (1910) 538, 108 Pac. 119, 109 Pac. 129; State v. Thomas, 152 Iowa (1911) 500, 132 N. W. 842; Macartney v. Shipherd, 60 Ore. (1911) 133, 117 Pac. 814; Duncan v. Baltimore &c. R. Co., 68 W. Va. (1911) 293, 69 S. E. 1004; Kurath v. Gove Automobile Co., 144 Wis. (1911) 480, 129 N. W. 619; Saffold v. Mangum, 138 Ga. (1912) 119, 76 S. E. 119; State ex rel. v. McQuillin, 246 Mo. (1912) 586, 151 S. W. 444; In re Cameron, 126 Tenn. (1912) 614, 151 S. W. 64; Beardon v. Daves, 139 Ga. (1913) 635, 77 S. E. 871; Cullins v. Williams, 156 Ky. (1913) 57, 160 S. W. 733; Knight v. Beyers, 70 Ore. (1913) 413, 134 Pac. 787; Deaton v. Commonwealth, 157 Ky. (1914) 308, 163 S. W. 204; Obenchain v. Ransome-Crummey Co., 69 Ore. (1914) 547, 138 Pac. 1078, 139 Pac. 920; United Fuel Gas Co. v. Public Serv. Commn., 73 W. Va. (1914) 571, 80 S. E. 931; Yazoo & M. V. R. Co. v. Scott, 108 Miss. (1915) 871, 67 So. 491; Young v. Colorado, 174 S. W. (Tex. Civ. App., 1915) 986; In re Supreme Court Commrs. 100 Nebr. (1914) 426, 160 N. W. 737; State ex rel. v. Cary, 166 Wis. (1917) 103, 163 N. W. 645; Appeal of Thompson, 116 Maine (1917) 473, 102 Atl. 303; Aultman v. Hodge, 147 Ga. (1918) 625, 95 S. E. 297; Creaghan v. Baltimore, 132 Md. (1918) 442, 104 Atl. 180; In re Slimmer's Est., 141 Minn. (1918) 131, 169 N. W. 536; Fort Worth v. Capps Land Co., 205 S. W. (Tex. Civ. App., 1918) 491; Bates v. Ransome-Crummey Co., 42 Cal. App. (1919) 669, 184 Pac. 39; McGinnis v. McGinnis, 289 Ill. (1919) 608, 124 N. E. 562; Shepard v. Springfield Fire & Marine Ins. Co., 42 R. I. (1919) 174, 105 Atl. 576; Eastman v. Dole, 213 Ill. App. (1920) 684; McLaughlin v. Barr, 191 Ky. (1921) 340, 230 S. W. 304; De Vane v. Bauman, 82 Fla. (1922) 346, 90 So. 192; State ex rel. v. Aetna Cas. & Sur. Co., 84 Fla. (1922) 123, 92 So. 871; Taylor v. Allen, 151 La. (1922) 82, 91 So. 635; Bagdonas v. Liberty Land & Invest. Co., 309 Ill. (1923) 103, 140 N. E. 49. But see per contra: State v. Gurney, 37 Maine (1853) 156, 58 Am. Dec. 732; State v. Guerringer, 205 Mo. (1915) 408, 178 S. W. 65; Dorris Motor Co. v. Colburn, 270 S. W. (Mo., 1925) 339.

[65] Missouri v. Lewis, 101 U. S. (1880) 22, 25 L. ed. 989; Mallett v. North Carolina, 181 U. S. (1901) 597, 45 L. ed. 1020; Sullivan v. Haug, 82 Mich. (1890) 548, 46 N. W. 795, 10 L. R. A. 203; State v. Jacksonville Terminal Co., 41 Fla. (1899) 363, 375, 27 So. 221; Dornhoefer v. Farley, 161 App. Div. (1914) 600, 146 N. Y. S. 891; Vetock v. Hufford, 74 W. Va. (1914) 785, 82 S. E. 1099.

[66] Hilton v. Merritt, 110 U. S. (1884) 97, 28 L. ed. 83; Ekiu v. United States, 142 U. S. (1892) 651, 35 L. ed. 1146; Lem Moon Sing v. United States, 158 U. S. (1895) 538, 39 L. ed. 1082; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. (1896) 112 at 167-170, 41 L. ed. 369; Long Island Water Sup. Co. v. Brooklyn, 166 U. S. (1897) 685 at 695, 41 L. ed. 1165; Louisville &c. R. Co. v. Kentucky, 183 U. S. (1902) 503 at 515, 516, 46 L. ed. 298; Public Clearing House v. Coyne, 194 U. S. (1904) 497, 48 L. ed. 1092; Interstate Commerce Commrn. v. Illinois Cent. R. Co., 215 U. S. (1910) 452, 54 L. ed. 280; Plymouth Coal Co. v. Pennsylvania, 232 U. S. (1914) 531, 58 L. ed. 713; German Alliance Co. v. Kansas, 233 U. S. (1914)

this power of the states in regulating their appellate systems. An appeal on the question of constitutionality of either procedure or result must always be permitted when fundamental rights are involved.[67] An attempt to curb the power of the courts over the constitutionality of statutes has been held void.[68]

§ 92. From this brief review of the development of the doctrine of notice and hearing as applied to administrative and judicial decisions,[69] it is obvious that it is subject to too many exceptions and modifications to be used as a suitable general norm of what is to constitute due process of law. Throughout the entire development of administrative law there has been the conflict between

389, 58 L. ed. 713; Louisiana v. McAdoo, 234 U. S. (1914) 627, 58 L. ed. 1506; Pacific Live Stock Co. v. Lewis, 241 U. S. (1916) 440, 60 L. ed. 1084; Mountain Timber Co. v. Washington, 243 U. S. (1917) 219 at 235, 61 L. ed. 685; Crane v. Hahlo, 258 U. S. (1922) 142, 66 L. ed. 514; Bratton v. Chandler, 260 U. S. (1923) 110 67 L. ed. 157; North German Lloyd S. S. Co. v. Hedden, 43 Fed. (1890) 17; Laidlaw v. Abraham, 43 Fed. (1890) 297; McLeod v. Receveur, 71 Fed. (1896) 458; Louisville &c. R. Co. v. Siler, 186 Fed. (1911) 176; Angelus v. Sullivan, 246 Fed. (1917) 54; Franke v. Murray, 248 Fed. (1918) 865; Killgore v. Zinkhan, 274 Fed. (1921) 140; In re Prospect Park &c. R. Co., 85 N. Y. (1881) 489; State ex rel. v. Stewart, 74 Wis. (1889) 620, 43 N. W. 947; Provident Sav. Life Assur. Soc. v. Cutting, 181 Mass. (1902) 261, 63 N. E. 433; State Board of Health v. St. Johnsbury, 82 Vt. (1909) 276, 73 Atl. 581; United Fuel Gas Co. v. Public Serv. Commn., 73 W. Va. (1914) 571, 80 S. E. 931; Raabe v. State, 7 Ohio. App. (1918) 119; Nega v. Chicago R. Co., 317 Ill. (1925) 482, 148 N. E. 250. For an excellent discussion of this point see F. J. Stimson, The American Constitution as It Protects Private Rights (N. Y., 1923), pp. 88-93. See also R. J. Swenson, National Government and Business (N. Y., 1924), pp. 57, 58.

[67] Freeland v. Williams, 131 U. S. (1889) 405 at 418, 33 L. ed. 193; Chicago, B. &c. R. Co. v. Chicago, 166 U. S. (1896) 226, 41 L. ed. 979; Backus v. Fort St. Union Depot Co., 169 U. S. (1898) 557, 42 L. ed. 853; Ohio Valley Water Co. v. Ben Avon, 253 U. S. (1920) 287 at 289, 64 L. ed. 908; Trustees of Saratoga Springs v. Saratoga Gas, E. L. & P. Co., 122 App. Div. (1908) 203, 107 N. Y. S. 341, 191 N. Y. (1908) 123, 83 N. E. 693; Market St. R. Co. v. Pacific Gas & Elec. Co., 6 Fed. (2d) (1925) 633. Nor can this right be taken away indirectly by intimidating the person affected through the levy of large penalties if he is unsuccessful. State ex rel. v. Watland, 201 N. W. (N. Dak., 1925) 680.

[68] People v. Max, 198 Pac. (Colo., 1921) 150.

[69] R. E. Bird, "Decay of Personal Rights and Guarantees," Yale Law Journal, Vol. XVIII (Feb., 1909), pp. 250-262, laments the growth of this body of administrative law and especially the tendency to cut down the requirements of a formal notice and hearing.

administrative necessity and expediency and the innate propensities of the courts to respect and preserve, if possible, the substance of judicial protection, even though in some cases its forms had to be foregone. Even in many of those cases where it was said that notice and hearing was not an absolute necessity, the courts have so construed the statutes or exercised their constitutional prerogatives as to give the substance of that protection. In spite of its limitations, dictated by administrative convenience, notice and hearing is still one of the most important elements in the procedure required by due process.[70]

[70] Postal Telegraph-Cable Co. v. Newport, 247 U. S. (1918) 464, 62 L. ed. 1215; Regal Drug Corp. v. Wardell, 260 U. S. (1923) 386, 67 L. ed. 318; State v. Cote, 122 Maine (1923) 450, 120 Atl. 538; Lacher v. Venus, 177 Wis. (1922) 558, 188 N. W. 613; Ex parte Sales, 108 Okla. (1925) 29, 233 Pac. 186.

CHAPTER XIV.

DUE PROCESS AND SETTLED USAGE.

§ 93. As a result of the difficulty which the courts encountered in applying the criterion of notice and hearing to all due process cases, great impetus was given to the idea that the "law of the land" was the common law of England. The difficulty of using notice and hearing as a norm first developed in cases of the summary collection of taxes. The necessities of an efficient tax administration, together with the inherent difference between tax proceedings and criminal prosecutions, made a different rule in the former cases not only wise, but necessary. This was recognized in the first cases of this nature; but the courts failed to find any way out of the difficulty except by holding that the legislative power was omnipotent in this respect,[1] or declaring that the tax really was a penalty and hence not subject to summary collection.[2] These cases came to be recognized as exceptions, however, and for a final solution of the problem the courts were driven to seek firmer ground. They found it in a stream of *dicta* in many of the stronger of the *ante-bellum* due process

1 State v. ———, 1 Hay. (N. Car., 1794) 28. Compare this case with the views of the court regarding summary procedure in Mayo v. Wilson, 1 N. H. (1817) 53.

2 State v. Allen, 2 McCord (S. Car., 1822) 55 at 56. The court here admitted that a distress warrant for *bona fide* taxes was valid process but in this case a tax of $10,000 was levied on everyone who kept a lottery and the court held that to enable this to be summarily collected would be in essence to summarily impose a penalty. Contrast the holding here with that of the United States Supreme Court in Hodge v. Muscatine County, 196 U. S. (1905) 276, 49 L. ed. 477, where a tax on the sale of tobacco was held to be summarily collectible by making it a lien on the property. The distinction between a tax and a penalty has been discussed in the Child Labor Tax Case. Bailey v. Drexel Furniture Co., 259 U. S. (1922) 20, 66 L. ed. 817.

cases to the effect that this protection insured a procedure according to the common law as it had been developed in England before the Revolution.[3] The origin of this doctrine may be traced to the efforts of the courts to be sure that due process would be effective as a limitation on the legislature. In order to make a clearer case for this doctrine, many judges had pointed out that the law of the land must have had reference to the English common law. These judges wrote the stronger opinions and consequently the ones more frequently cited. Their doctrines, therefore, soon began to wield a tremendous influence on the courts, not only of their own state but of most of the other states of the Union as well.[4]

§ 94. It was out of this fabric that the Supreme Court of Illinois first,[5] and the Supreme Court of the United States a decade later in the famous case of Murray v. Hoboken Land and Improvement Company, built their reasoning. If the common law was to be the test by which statutes were to be judged, the courts could determine their legality by the simple expedient of looking backward to the usage in England "prior to the emigration of our ancestors" and by means of this convenient yardstick the validity of all matters of procedure might be deter-

[3] Hutchins v. Edson, 1 N. H. (1817) 139; Dartmouth College v. Woodward, 4 Wheat. (U. S., 1819) 518 at 667, 4 L. ed. 629; In re Dorsey, 7 Port. (Ala., 1838) 293; Taylor v. Porter, 4 Hill (N. Y., 1843) 140, 40 Am. Dec. 274; Robinson v. Barfield, 2 Murphy (N. Car., 1818) 391; Reed v. Wright, 2 G. Greene (Iowa, 1849) 15; Wright v. Wright's Lessee, 2 Md. (1852) 429, 56 Am. Dec. 723; Saco v. Wentworth, 37 Maine (1853) 165, 58 Am. Dec. 786; Westervelt v. Gregg, 12 N. Y. (1854) 202, 62 Am. Dec. 160.

[4] This was especially true of In re Dorsey, 7 Port. (Ala., 1838) 293; Taylor v. Porter, 4 Hill (N. Y., 1843) 140, 40 Am. Dec. 274; Westervelt v. Gregg, 12 N. Y. (1854) 202, 62 Am. Dec. 160. See also: Greene v. Briggs, Fed. Cas. No. 5,764, I Curt. (U. S., 1852) 311; Vanzant v. Waddel, 10 Tenn. (1829) 260; Bank of the State v. Cooper, 10 Tenn. (1831) 599, 605; Wally's Heirs v. Kennedy, 2 Yerg. (Tenn., 1831) 554, 24 Am. Dec. 511; Officer v. Young, 13 Tenn. (1833) 320, 26 Am. Dec. 268; Jones' Heirs v. Perry, 18 Tenn. (1836) 59; Ross v. Irving, 14 Ill. (1852) 171; Martin's Executors v. Martin, 25 Ala. (1854) 201; Alexandria v. Dearmon, 34 Tenn. (1854) 104.

[5] Rhinehart v. Schuyler, 7 Ill. (1845) 473.

mined.[6] The reasoning in this case, together with the decision, has been very severely criticized by Professor Taylor[7] on the ground that English usage did not authorize distress warrants; but he seems practically alone in his objections. A more prevalent viewpoint is that this case is a turning point in the evolution of due process of law. This, however, would appear to be putting the matter somewhat strongly in view of the whole development of the procedural aspects of this protection, both before and subsequent to this case.

It is certain that the rule as laid down was far from an innovation. It rested on the reasoning of eminent jurists in some of the best state decisions,[8] and while it has been consistently followed in similar cases,[9] its sig-

[6] "Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the states at the time of the adoption of this amendment, the proceedings authorized by the Act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the Constitution some other provision which restrains Congress from authorizing such proceedings." Justice Curtis in upholding the use of distress warrants for the summary collection of money due the federal government. Murray v. Hoboken Land and Improvement Co., 18 How. (U. S., 1855) 272 at 280, 15 L. ed. 372.

[7] Hannis Taylor, Due Process of Law and Equal Protection of the Law (Chicago, 1917), pp. 186-208.

[8] See n. 4, 5.

[9] Springer v. United States, 102 U. S. (1880) 586, 26 L. ed. 253; Hilton v. Merritt, 110 U. S. (1884) 97, 28 L. ed. 83; Palmer v. McMahon, 133 U. S. (1890) 660, 33 L. ed. 772; Hodge v. Muscatine County, 196 U. S. (1905) 276, 49 L. ed. 477; Scottish U. & N. Ins. Co. v. Bowland, 196 U. S. (1906) 611, 49 L. ed. 619. "Laws for the assessment and collection of general taxes stand upon a somewhat different footing, and are construed with the utmost liberality sometimes even to the extent of holding that no notice whatever is necessary." Turpin v. Lemon, 187 U. S. (1902) 51 at p. 58, 47 L. ed. 70. It is upon a similar line of reasoning that the court upheld statutes extending the power of issuing injunctions. "The proceeding by which the fine and imprisonment imposed upon these parties for contempt in violating the injunction of the court, regularly issued in a suit to which they were parties, is due process of law, and always has been due process of law, and is the process or proceeding by which courts have from time immemorial enforced the execution of their orders and decrees." Justice Miller, Eilenbecker v. Plymouth County, 134 U. S. (1890) 31, 39 L. ed. 801. See also Carleton v. Rugg, 149 Mass. (1889) 550, 22 N. E. 55. For a recent discussion see R. N. Golding, "Constitutional Questions Involved in the Abatement and Injunction Section of the National Prohibition Act," Illinois Law Review, Vol. XIX (June, 1924), pp. 71-79.

Other cases showing the influence of the common law in the develop-

nificance seems not to have been generally recognized for some time. Cooley makes only passing references to it.[10] A Michigan case considered shortly afterward, while deciding the issue the same way, put the matter on quite other grounds,[11] and the reasoning of the Murray case is reflected in but a handful of state decisions before the adoption of the Fourteenth Amendment.[12] Some of these seem to have taken their logic from the other state cases rather than from the federal decision.

The importance of the Murray case, therefore, arises not so much from its being a break with the past and a turning point in the development of constitutional law as from the future development which was based on it. It was this decision which formed the foundation for the enormous judicial expansion of due process after the adoption of the Fourteenth Amendment. Upon its authority the federal courts definitely recognized the state rule that

ment of due process are: Lowe v. Kansas, 163 U. S. (1896) 81, 41 L. ed. 78; Grant Timber & Mfg. Co. v. Gray, 236 U. S. (1915) 133, 59 L. ed. 501; Crane v. Hahlo, 258 U. S. (1922) 142, 66 L. ed. 514; Mason v. Messenger, 17 Iowa (1864) 261; Beaupre v. Hoerr, 13 Minn. (1868) 366; Johnson v. Ackerson, 3 Daly (N. Y., 1871) 430; State v. Doherty, 60 Maine (1872) 504; Kingsbury v. Chatham R. Co., 66 N. Car. (1872) 284; Sydnor v. Palmer, 32 Wis. (1873) 406; March v. State, 44 Tex. (1873) 64; Odum v. Garner, 86 Tex. (1874) 374, 25 S. W. 18; Alvord v. Little, 16 Fla. (1877) 158; Eikenberry v. Edwards, 71 Iowa (1877) 82; Willoughby v. George, 5 Colo. (1879) 80; Bond v. First Nat. Bank, 5 Colo. (1879) 83; Yeatman v. Day, 79 Ky. (1880) 186; Elston v. Piggott, 94 Ind. (1884) 14; Maguiar v. Henry, 84 Ky. (1886) 1, 4 Am. St. 182; State v. Lake Shore &c. R. Co., 1 Ohio N. P. (1892) 292; Persing v. Reno Stock Brokerage Co., 30 Nev. (1908) 342; People v. Strassheim, 242 Ill. (1909) 359, 90 N. E. 118; Ives v. South Buffalo R. Co., 201 N. Y. (1911) 271, 94 N. E. 431; Ekern v. McGovern, 154 Wis. (1913) 157, 142 N. W. 595.

[10] T. M. Cooley, Constitutional Limitations (6th ed.), p. 497; General Principles of Constitutional Law (3rd ed.), p. 242.

[11] Sears v. Cottrell, 5 Mich. (1858) 251. The court refused to consider any objection unless there was a specific statement in the constitution against it and declared that judges were too prone to look for hidden or abstruse meanings in the general phrases. Cf. Cavendar v. Smith's Heirs, 5 Iowa (1857) 157. See also: Smith v. Packard, 12 Wis. (1860) 371, 412; Cummings v. White Mt. R., 43 N. H. (1861) 114; Page v. Matthews' Admr., 40 Ala. (1867) 547; Davis v. Menasha, 21 Wis. (1867) 491.

[12] Brooks v. McIntyre, 4 Mich. (1856) 316; State v. Learned, 47 Maine (1860) 426; Griffin v. Mixon, 38 Miss. (1860) 424; Rison v. Farr, 24 Ark. (1865) 161, 87 Am. Dec. 52; Jones v. Robbins, 8 Gray (Mass., 1857) 329.

the principles of the common law are to be considered the acid test of what procedure was or was not due process of law, and because of this recognition the way was paved for the application of the phrase to the new conditions of life and legislation which were to develop in the last part of the nineteenth century and the first of the twentieth. Such a decision was prerequisite to this development, for by recognizing the common law as the final authority in due process cases the courts were provided with a means by which that concept could be infinitely extended to cover not only procedural cases but those involving the police power and taxation as well.

§ 95. The common-law test, however, was not entirely satisfactory, for it tended to fasten on the courts the form of procedure of the colonial period "like a straight jacket, only to be unloosed by a constitutional amendment."[13] Judge Cooley pointed out that this protection had reference to the principles of the common law, and not to its form,[14] and this seems to have been a faithful statement of the law as it was laid down by many of the state courts.[15] The federal courts, however, refused to change their position, and for a time it was generally considered that, as regards those courts at least, the forms of the common law was as unalterable as the law of the Medes and Persians.

In the eighties, a far-reaching change came over the Supreme Court. The influence of such men as Field and Harlan was having a telling effect, and the tribunal soon began to take steps to regain its constitutional position as the real supervisor of legislation.

13 Justice Moody, Twining v. New Jersey, 211 U. S. (1908) 78, 53 L. ed. 97.

14 Constitutional Limitations, p. 434.

15 Judge Cole declared: "The legislature has the power to change the remedies while they cannot affect the rights." Mason v. Messenger, 17 Iowa (1864) 261. See also People v. Tibbets, 4 Cowen (N. Y., 1825) 384; Newland v. Marsh, 19 Ill. (1856) 376; Davidson v. Farrell, 8 Minn. (1863) 258; Rowan v. State, 30 Wis. (1872) 129, 11 Am. Rep. 559; Brown v. Levee Commrs., 50 Miss. (1874) 468.

This changed attitude came just at the period when the activities of the federal government were undergoing their greatest expansion and when a tremendous economic revolution was taking place in the industrial life of the community. Free land had practically disappeared, the old frontier was gone, the industrial revolution had taken place, and pragmatic philosophy was just coming into its own. These and other influences were destined to work a change in the judicial history of America fully as significant as that wrought in its economic development. The court gradually spelled the death sentence of the old formalistic doctrines, and a broader more potent viewpoint emerged. Unfortunately, this has had the undesirable effect, which is indeed true in any period of judicial transition, of making the law appear unsettled if not positively without definite principles and it has only been very recently that the fundamental doctrines behind the new judicial viewpoint have come to the front.

§ 96. The key-note of the new attitude as regards procedure was struck in the important case of Hurtado v. California in which the court declared that an indictment need not be by grand jury if the protection given the accused is substantially the same as by the old common-law method.[16] Justice Mathews did not entirely over-

[16] Hurtado v. California, 110 U. S. (1884) 516, 28 L. ed. 232. Four years earlier the new attitude had been foreshadowed in the case of In re Kemmler, 136 U. S. (1880) 436, 34 L. ed. 519, in which the Supreme Court upheld the constitutionality of the death penalty by electrocution rather than hanging. "As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so, in the Fourteenth Amendment, the same words refer to that law of the land in each state which derives its authority from the inherent and reserve powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Per Chief Justice Fuller at p. 448. A similar decision was rendered in a number of state courts before the Hurtado case. See Cooley, Constitutional Limitations (6th ed.), p. 374. See especially State v. Comstock, 27 Vt. (1855) 553; Rowan v. State, 30 Wis. (1872) 129, 11 Am. Rep. 559. It had been foreshadowed by Justice Field in Pennoyer v. Neff, 95 U. S. (1877) 714 at 733, 24 L. ed. 565.

rule the Murray case, for he agreed with the broad principle that whatever settled English usage at common law approved certainly would be held to be due process of law. His contention was that other forms of procedure should also be upheld.[17] The language of the decision was very broad,[18] and the opinion gradually became prev-

[17] This case in decision and reasoning is almost exactly opposite to Jones v. Robbins, 8 Gray (Mass., 1857) 329. See also In re Opinion of the Justices, 232 Mass. (1919) 601, 123 N. E. 100. However, it should be noted that indictment by information rather than grand jury had been frequently used at common law. Prynn's Case, 5 Mod. (1691) 459; Holt (K. B., 1691) 362; King v. Abraham, 1 Show. (K. B., 1689) 49; King v. Berchet, 1 Show. (K. B., 1690) 106.

It has been followed in: Dowdell v. United States, 221 U. S. (1911) 325, 55 L. ed. 753; Lem Woon v. Oregon, 229 U. S. (1913) 586, 57 L. ed. 1340; Le Clair v. White, 117 Maine (1918) 335, 104 Atl. 516; People v. Boykin, 298 Ill. (1921) 11, 131 N. E. 133; State v. Keeney, 153 Minn. (1923) 153, 189 N. W. 1023.

Indictment by information has been upheld: McNulty v. California, 149 U. S. (1892) 645, 37 L. ed. 882; Talton v. Mayes, 163 U. S. (1896) 382, 41 L. ed. 198; Bolln v. Nebraska, 176 U. S. (1897) 83, 44 L. ed. 382; Maxwell v. Dow, 176 U. S. (1900) 581, 44 L. ed. 597; Davis v. Burke, 179 U. S. (1900) 403, 45 L. ed. 252; Patterson v. Colorado ex rel., 205 U. S. (1907) 454, 51 L. ed. 879; Dowdell v. United States, 221 U. S. (1911) 325, 55 L. ed. 753; Lem Woon v. Oregon, 229 U. S. (1913) 586, 57 L. ed. 1340; Graham v. West Virginia, 224 U. S. (1912) 616, 56 L. ed. 917; In re Humason, 46 Fed. (1891) 388; Williams v. Hert, 110 Fed. (1901) 166; State v. Comstock, 27 Vt. (1855) 553; Rowan v. State, 30 Wis. (1872) 129, 11 Am. Rep. 559; Kalloch v. Superior Court, 56 Cal. (1880) 229; State v. Boswell, 104 Ind. (1885) 541, 4 N. E. 675; State v. Tucker, 36 Ore. (1900) 291, 61 Pac. 894, 51 L. R. A. 246; In re Dolph, 17 Colo. (1891) 35, 28 Pac. 470; State v. Brett, 16 Mont. (1895) 360, 40 Pac. 873; Hodgson v. Vermont, 168 U. S. (1897) 262, 42 L. ed. 361; People v. Flannelly, 128 Cal. (1900) 83, 60 Pac. 670; State v. Jones, 168 Mo. (1902) 398, 68 S. W. 566; State v. Guglielmo, 46 Ore. (1905) 250, 79 Pac. 577, 80 Pac. 103; State v. Stimpson, 78 Vt. (1905) 124, 62 Atl. 14, 1 L. R. A. (N. S.) 1153; State v. Ju Nun, 53 Ore. (1908) 1, 97 Pac. 96, 98 Pac. 513; In re McNaught, 1 Okla. Cr. (1909) 528, 99 Pac. 241; Commonwealth v. Francies, 250 Pa. (1915) 496, 95 Atl. 527; White v. State, 23 Wyo. (1915) 130, 147 Pac. 171, 148 Pac. 342; Le Clair v. White, 117 Maine (1918) 335, 104 Atl. 516; People v. Boykin, 298 Ill. (1921) 11, 131 N. E. 133; State v. Keeney, 153 Minn. (1922) 153, 189 N. W. 1023.

With respect to the constitutionality of changes in the scope and form of the indictment see Egan v. Knewel, 298 Fed. (1925) 784; State v. Cole, 158 La. (1925) 799, 104 So. 720.

[18] "There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms....

alent that any administration of justice which had the approval of settled usage would be considered due process so far as its procedural aspects were concerned. But for some time this doctrine of settled usage did not result in a repudiation of the necessity of common-law methods of procedure.[19] It is believed that the "struck jury" case (1899) was the first one in which the court upheld a substantial departure from the forms used at common law.[20] Indeed cases where the courts have upheld a real departure from the common-law standards have been rather few,[21] and the courts continue to make very liberal use

"It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." Hurtado v. People, 110 U. S. (1884) 516 at 531, 537, 28 L. ed. 232.

[19] Ex parte Ulrich, 42 Fed. (1890) 587.

[20] Brown v. New Jersey, 175 U. S. (1899) 172, 44 L. ed. 119. The court even here pointed out that a "struck jury" was not unknown at common law although it seems never to have been used for murder cases as it was under the New Jersey law. The law was upheld because it gave a fair and reasonable trial to the accused and accorded with the spirit of the common-law protections.

[21] West v. Louisiana, 194 U. S. (1904) 258, 48 L. ed. 965; Chicago, R. I. &c. R. Co. v. Cole, 251 U. S. (1919) 54, 64 L. ed. 133; United States v. Balint, 258 U. S. (1922) 250, 66 L. ed. 604.

Note also that the argument of counsel in Nance v. O. K. Houck Piano Co., 128 Tenn. (1913) 1, 155 S. W. 1172, to the effect that due process prevents a change in the common law was distinctly repudiated by the court. See also State v. Smith, 158 La. (1925) 129, 103 So. 534.

The largest group of cases involving changes in the rules of the common law is that involving the liability of employers under the Workmen's Compensation Acts. The reasoning in these cases rests upon the same principles as that of the Hurtado Case. These Acts have been upheld: Missouri Pac. R. Co. v. Mackey, 127 U. S. (1888) 205, 32 L. ed. 107; Minneapolis &c. R. Co. v. Herrick, 127 U. S. (1888) 210, 32 L. ed. 109; Chicago, K. &c. R. Co. v. Pontius, 157 U. S. (1895) 209, 39 L. ed. 675; Tullis v. Lake Erie &c. R. Co., 175 U. S. (1899) 348, 44 L. ed. 192; St. Louis Merchants' Bridge Ter. R. Co. v. Callahan, 194 U. S. (1904) 628, 48 L. ed. 1157; Minnesota Iron Co. v. Kline, 199 U. S. (1905) 593, 50 L. ed. 322; Martin v. Pittsburg &c. R. Co., 203 U. S. (1906) 284, 51 L. ed. 184; Wilmington Star Min. Co. v. Fulton, 205 U. S. (1907) 60, 51 L. ed. 708; Employers' Liability Cases, 207 U. S. (1908) 463, 52 L. ed. 297; El Paso &c. R. Co. v. Gutierrez, 215 U. S. (1909) 87, 54 L. ed. 106; Louisville &c. R. Co. v. Melton, 218 U. S. (1910) 36, 54 L. ed. 921; Mobile J. &c. R. Co. v. Turnipseed, 219 U. S. (1910) 35, 55 L. ed. 78; Chicago, B. &c. R. Co. v. McGuire, 219 U. S. (1911) 549, 55 L. ed. 328; Second Employers' Liability Cases, 223 U. S. (1912) 1, 56 L. ed. 327; Missouri Pac. R. Co. v. Castle, 224 U. S. (1912) 541, 56 L. ed. 875; Chicago, I. &c.

of the common law as a basic test of valid procedure under

R. Co. v. Hackett, 228 U. S. (1913) 559, 57 L. ed. 966; Bowersock v. Smith, 243 U. S. (1917) 29, 61 L. ed. 572; New York Cent. R. Co. v. White, 243 U. S. (1917) 188, 61 L. ed. 667; Hawkins v. Bleakly, 243 U. S. (1917) 210, 61 L. ed. 678; Mountain Timber Co. v. Washington, 243 U. S. (1917) 219, 61 L. ed. 685; Middleton v. Texas Power & Light Co., 249 U. S. (1919) 152, 63 L. ed. 527; Arizona Employers' Liability Cases, 250 U. S. (1919) 400, 63 L. ed. 1058; Lower Vein Coal Co. v. Industrial Board, 255 U. S. (1921) 144, 65 L. ed. 555; Reed v. Director General of Railroads, 258 U. S. (1922) 92, 66 L. ed. 480; Ward & Gow v. Krinsky, 259 U. S. (1922) 503, 66 L. ed. 1033; Madera Sugar Pine Co. v. Industrial Acc. Commn., 262 U. S. (1923) 499, 67 L. ed. 1091; Chicago, R. I. &c. R. Co. v. Stahley, 62 Fed. (1894) 363; Peirce v. Van Dusen, 78 Fed. (1897) 693; Stoll v. Pacific Coast S. S. Co., 205 Fed. (1913) 169; McAunich v. Mississippi &c. R. Co., 20 Iowa (1866) 338; Deppe v. Chicago, R. I. &c. R. Co., 36 Iowa (1873) 52; Thompson v. Central R. & Bank. Co., 54 Ga. (1875) 509; Ditberner v. Chicago, M. &c. R. Co., 47 Wis. (1879) 138, 2 N. W. 69; Georgia R. Co. v. Ivey, 73 Ga. (1884) 499; Bucklew v. Central Iowa R. Co., 64 Iowa (1884) 603, 21 N. W. 103; Missouri Pac. R. Co. v. Mackey, 33 Kans. (1885) 298, 6 Pac. 291; Quackenbush v. Wisconsin &c. R. Co., 62 Wis. (1885) 411, 22 N. W. 519; Quackenbush v. Wisconsin &c. R. Co., 71 Wis. (1888) 472, 37 N. W. 834; Campbell v. Cook, 86 Tex. (1894) 630, 26 S. W. 486, 40 Am. St. 878; Pittsburgh, C., C. &c. R. Co. v. Montgomery, 152 Ind. (1898) 1, 49 N. E. 582; Carterville Coal Co. v. Abbott, 181 Ill. (1899) 495, 55 N. E. 131; Odin Coal Co. v. Denman, 185 Ill. (1900) 413, 57 N. E. 192; Lore v. American Mfg. Co., 160 Mo. (1901) 608, 61 S. W. 678; Thomas v. Raleigh &c. R. Co., 129 N. Car. (1901) 392, 40 S. E. 201; Cogdell v. Southern R. Co., 129 N. Car. (1901) 398, 40 S. E. 202; Coley v. North Carolina R. Co., 129 N. Car. (1901) 407, 40 S. E. 195; Davis Coal Co. v. Polland, 158 Ind. (1902) 607, 62 N. E. 492; Island Coal Co. v. Swaggerty, 159 Ind. (1902) 664, 62 N. E. 1103, 65 N. E. 1026; Mott v. Southern R. Co., 131 N. Car. (1902) 234, 42 S. E. 601; Kilpatrick v. Grand Trunk R. Co., 74 Vt. (1902) 288, 52 Atl. 531; Walker v. Carolina Cent. R. Co., 135 N. Car. (1904) 738, 47 S. E. 675; Hall v. West & Slade Mill Co., 39 Wash. (1905) 447, 81 Pac. 915; Vindicator Consol. Gold Min. Co. v. Firstbrook, 36 Colo. (1906) 498, 86 Pac. 313; Rio Grande Sampling Co. v. Catlin, 40 Colo. (1907) 450, 94 Pac. 323; United States Cement Co. v. Cooper, 82 N. E. (Ind. App., 1907) 981; Kiley v. Chicago, M. &c. R. Co., 138 Wis. (1909) 215, 119 N. W. 309, 120 N. W. 756; Washington v. Atlantic Coast Line R. Co., 136 Ga. (1911) 638, 71 S. E. 1066; In re Opinion of the Justices, 209 Mass. (1911) 607, 96 N. E. 308; State ex rel. v. Clausen, 65 Wash. (1911) 156, 117 Pac. 1101; Borgnis v. Falk Co., 147 Wis. (1911) 327, 133 N. W. 209; Sonsmith v. Pere Marquette R. Co., 173 Mich. (1912) 57, 138 N. W. 347; Hawkins v. Smith, 242 Mo. (1912) 688, 147 S. W. 1042; State ex rel. v. Creamer, 85 Ohio St. (1912) 349, 97 N. E. 602; Kreps v. Brady, 37 Okla. (1912) 754, 133 Pac. 216; Sexton v. Newark Dist. Tel. Co., 84 N. J. L. (1913) 85, 86 Atl. 451; Lawson v. Halifax Tonopah Min. Co., 36 Nev. (1913) 591, 135 Pac. 611, 138 Pac. 261; Deibeikis v. Link-Belt Co., 261 Ill. (1914) 454, 104 N. E. 211; Crooks v. Tazewell Coal Co., 263 Ill. (1914) 343, 105 N. E. 132; Dietz v. Big Muddy Coal & Iron Co., 263 Ill. (1914) 480, 105 N. E. 289; Shade v. Ash Grove Lime & Portland Cem. Co., 93 Kans. (1914) 257, 144 Pac. 249; Mathison v. Minneapolis St. R. Co., 126 Minn. (1914) 286, 148 N. W. 71; Jeffrey Mfg.

this clause,[22] although in practically every case it is clearly stated that there might be other criterions of due process fully as acceptable as the one used.[23]

The reaction of the courts to the Hurtado case, therefore, was not so much one in which the common-law basis for due process was overthrown, as one in which they were willing to consider other modes of procedure as valid. To narrow the modes of trial to any one particular process seemed far too rigid and very shortly after the break had been made in this respect there followed a

Co. v. Blagg, 90 Ohio St. (1914) 376, 108 N. E. 465; Porter v. Hopkins, 91 Ohio St. (1914) 74, 109 N. E. 629; Memphis Cotton Oil Co. v. Tolbert, 171 S. W. (Tex. Civ. App., 1914) 309; Western Indemnity Co. v. Pillsbury, 170 Cal. (1915) 686, 151 Pac. 398; Hovis v. Cudahy Refin. Co., 95 Kans. (1915) 505, 148 Pac. 626; Wood v. Detroit, 188 Mich. (1915) 547, 155 N. W. 592; Wheeler v. Contoocook Mills Corp., 77 N. H. (1915) 551, 94 Atl. 265; Jensen v. Southern Pac. Co., 215 N. Y. (1915) 514, 109 N. E. 600; Evanhoff v. State Industrial Acc. Commn., 78 Ore. (1915) 503, 154 Pac. 106; Consumers' Lignite Co. v. Grant, 181 S. W. (Tex. Civ. App., 1915) 202; De Francesco v. Piney Min. Co., 76 W. Va. (1915) 756, 86 S. E. 777; Strom v. Postal Tel. C. Co., 271 Ill. (1916) 544, 111 N. E. 555; Victor Chemical Works v. State Industrial Board, 274 Ill. (1916) 11, 113 N. E. 173; Hunter v. Colfax Consol. Coal Co., 175 Iowa (1916) 245, 154 N. W. 1037, 157 N. W. 145; Sayles v. Foley, 38 R. I. (1916) 484, 96 Atl. 340; Middleton v. Texas Power & Light Co., 108 Tex. (1916) 96, 185 S. W. 556; Watts v. Ohio Valley Elec. R. Co., 78 W. Va. (1916) 144, 88 S. E. 659. *Contra:* Hoxie v. New York, N. H. &c. R. Co., 82 Conn. (1909) 352, 73 Atl. 754; Ives v. South Buffalo R. Co., 201 N. Y. (1911) 271, 94 N. E. 431.

[22] Dent v. West Virginia, 129 U. S. (1889) 114, 32 L. ed. 623; Palmer v. McMahon, 133 U. S. (1890) 660, 33 L. ed. 772; Schwab v. Berggren, 143 U. S. (1892) 442, 36 L. ed. 218; Fielden v. Illinois, 143 U. S. (1892) 452, 36 L. ed. 224; Hallinger v. Davis, 146 U. S. (1892) 314, 36 L. ed. 986; Crain v. United States, 162 U. S. (1896) 625, 40 L. ed. 1097; Lowe v. Kansas, 163 U. S. (1896) 81, 41 L. ed. 78; Holden v. Hardy, 169 U. S. (1898) 366, 42 L. ed. 80; Scottish Union & Nat. Ins. Co. v. Bowland, 196 U. S. (1904) 611, 49 L. ed. 619; United States v. Ju Toy, 198 U. S. (1905) 253, 49 L. ed. 1040; Twining v. New Jersey, 211 U. S. (1908) 78, 53 L. ed. 97; Standard Oil Co. v. Missouri ex rel., 224 U. S. (1912) 270, 56 L. ed. 760; Ochoa v. Morales, 230 U. S. (1913) 139, 57 L. ed. 1427; Billings v. United States, 232 U. S. (1914) 261, 58 L. ed. 596; Crane v. Hahlo, 258 U. S. (1922) 142 at p. 147, 66 L. ed. 514. In the last case Justice Clarke said, "In determining whether or not due process of law has been denied, regard must always be had to the character of the proceeding involved for the purpose of determining what the practice at common law was and what the practice in this country has been in like cases." See also Nance v. O. K. Houck Piano Co., 128 Tenn. (1913) 1, 155 S. W. 1172.

[23] In some cases there was a strenuous dissent, as in the case of Crain v. United States, 162 U. S. (1896) 625, 40 L. ed. 1097, to that portion of the decision which upheld the common-law basis.

series of *dicta* in which it was declared that no particular form of procedure was required by the law of the land.[24] Into this doctrine was injected other *dicta* which had been worked out a few years before by the state courts to the effect that any process which had the sanction of prescription would be considered due process.[25] In the earlier cases of this kind the courts pointed out that the changes from the common law were but slight.[26] Sometimes the regular judicial administration of justice was retained.[27] Indeed, it was not until the very end of the century that the court placed its opinion most exclusively on the ground of settled usage.[28] Even in this case there was no good reason why the common-law test might not have been used

[24] Ex parte Reggel, 114 U. S. (1885) 642, 29 L. ed. 250; Rogers v. Peck, 199 U. S. (1905) 425 at 435, 50 L. ed. 256; Reaves v. Ainsworth, 219 U. S. (1911) 296, 55 L. ed. 225; Garland v. Washington, 232 U. S. (1913) 642, 58 L. ed. 772; Frank v. Mangum, 237 U. S. (1914) 309, 59 L. ed. 969. In Iowa Central R. Co. v. Iowa, 160 U. S. (1896) 389 at 393, 40 L. ed. 467, the court declared: "It is clear that the Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced."

See also: Kennard v. Louisiana ex rel., 92 U. S. (1875) 480, 23 L. ed. 478; Kelly v. Pittsburgh, 104 U. S. (1881) 78, 26 L. ed. 658; Palmer v. McMahon, 133 U. S. (1890) 660, 33 L. ed. 772; Wilson v. North Carolina, 169 U. S. (1898) 586, 42 L. ed. 865; Reetz v. Michigan, 188 U. S. (1903) 507, 47 L. ed. 566; Ballard v. Hunter, 204 U. S. (1907) 241, 51 L. ed. 461; Ownbey v. Morgan, 256 U. S. (1921) 94, 65 L. ed. 837; McKeever v. Jenks, 59 Iowa (1882) 300, 13 N. W. 295; Balch v. Glenn, 85 Kans. (1911) 735, 119 Pac. 67; Cunningham v. Northwestern Imp. Co., 44 Mont. (1911) 180, 119 Pac. 554; Carnegie Natural Gas Co. v. Swiger, 72 W. Va. (1913) 557, 79 S. E. 3; Le Clair v. White, 117 Maine (1918) 335, 104 Atl. 516; In re Opinion of the Justices, 232 Mass. (1919) 601, 123 N. E. 100.

[25] In Westervelt v. Gregg, 12 N. Y. (1854) 202, 62 Am. Dec. 160, the court looked to the common law to see what was the settled usage. The doctrine of prescription has also been used in Rowan v. State, 30 Wis. (1872) 129, 11 Am. Rep. 559; Gilchrist v. Schmidling, 12 Kans. (1873) 263 at 271.

[26] Louisville &c. R. Co. v. Woodson, 134 U. S. (1890) 614, 33 L. ed. 1032; Brown v. New Jersey, 175 U. S. (1899) 172, 44 L. ed. 119; West v. Louisiana, 194 U. S. (1904) 258, 48 L. ed. 965; Anderson v. Messenger, 158 Fed. (1907) 250.

[27] Leeper v. Texas, 139 U. S. (1891) 462, 35 L. ed. 225; Iowa Cent. R. Co. v. Iowa, 160 U. S. (1896) 389, 40 L. ed. 467.

[28] Roller v. Holly, 176 U. S. (1899) 398, 44 L. ed. 520, in which the court declared void a statute providing for only five days notice before a suit was to be heard on the ground that it was customary to have ample time to prepare the case. See also Ochoa v. Morales, 230 U. S. (1913) 139, 57 L. ed. 1427.

as well. It appears, therefore, that the settled usage doctrine has hardly been accepted by the courts as a sole test of what constitutes due process. In connection with evidence that the law gives the basic protection required by the common-law methods, it may be given considerable weight.[29]

§ 97. Side by side with the efforts of the courts to give a wider scope to the meaning of due process of law than that which the forms of the common law could give, there has developed a tendency to look upon the law of the land as being based upon certain inherent fundamental principles of society and government. In the Hurtado case the court quoted from the Mississippi court to the effect that it was the fundamental principles of the system of jurisprudence established in the common law which formed the essence of due process.[30] This concept is closely akin to that long and continuous stream of *dicta* to the effect that the final norm of the law of the land is to be found in "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[31] It was said in 1884 that the courts

[29] See McManus v. Burrows, 280 Mo. (1920) 327, 217 S. W. 512; Crane v. Hahlo, 258 U. S. (1922) 142, 66 L. ed. 514.

[30] "It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by 'due course of law.'" Brown v. Levee Commrs., 50 Miss. (1874) 468 at 479. Compare State v. Learned, 47 Maine (1860) 426.

[31] Davidson v. New Orleans, 96 U. S. (1877) 97 at 102, 24 L. ed. 616. A similar idea was expressed in: Pennoyer v. Neff, 95 U. S. (1877) 714, 24 L. ed. 565; In re Kemmler, 136 U. S. (1880) 436, 34 L. ed. 519; United States v. Lee, 106 U. S. (1882) 196, 27 L. ed. 171; Holden v. Hardy, 169 U. S. (1898) 366 at 389, 42 L. ed. 780; West v. Louisiana, 194 U. S. (1904) 258, 48 L. ed. 965; Twining v. New Jersey, 211 U. S. (1908) 78, 53 L. ed. 97; State Savings & Commercial Bank v. Anderson, 165 Cal. (1913) 437, 132 Pac. 755, affirmed, 238 U. S. (1915) 611, 59 L. ed. 1488; Truax v. Corrigan, 257 U. S. (1921) 312, 66 L. ed. 254; Ownbey v. Morgan, 256 U. S. (1921) 94, 65 L. ed. 837; Endicott-Johnson Corp. v. Encyclopedia Press, 266 U. S. (1925) 285, 69 L. ed. 288; United States v. Moore, 129 Fed. (1904) 630; United States v. Yount, 267 Fed. (1920) 861; Ex parte Ah Fook, 49 Cal. (1874) 402; Weimer v. Bunbury, 30 Mich. (1874) 201; Brown v. Levee Commrs., 50 Miss. (1874) 468; Atchison & N. R. Co. v. Baty, 6 Nebr. (1877) 37, 29 Am. Rep. 356; Beyman v. Black, 47

would depart from the common law only to secure the principles of liberty and justice for which it stood,[32] a hint which has been repeated in a more recent case.[33] But it seems that nowhere has the federal Supreme Court distinctly correlated these principles of social existence, justice, and liberty with the older fundamental elements of the common law. This is undoubtedly due to the fact that the doctrine of fundamental principles of society as the basis of due process arose together with the doctrine of settled usage as a revolt against the older formalism of the stereotyped procedure of that system.

§ 98. The antithesis between these two viewpoints, however, is not nearly as great as might appear at first blush. In the first place, the common law did work out some rather accurate and definite principles of public policy[34] and in that respect at least one may say the elements of social organization, so far as we have ascertained them, may be found in that system. In the second place, the common law forms the fabric out of which our entire legal and governmental system has developed and it would be strange indeed if the source of our political ideas should be far removed in fundamental principles from the

Tex. (1877) 558; South Platte Land Co. v. Buffalo, 7 Nebr. (1878) 253; Kalloch v. Superior Ct., 56 Cal. (1880) 229; In re Lowrie, 8 Colo. (1886) 499, 9 Pac. 489; State v. Whisner, 35 Kans. (1886) 271, 10 Pac. 852; Cleveland, C. C. &c. R. Co. v. Backus, 133 Ind. (1893) 513, 33 N. E. 421; Pittsburgh, C. C. &c. R. Co. v. Backus, 133 Ind. (1893) 625, 33 N. E. 432; State v. Julow, 129 Mo. (1895) 163, 31 S. W. 781; Chicago, B. &c. R. Co. v. State, 47 Nebr. (1896) 549, 66 N. W. 624; State v. Sponaugle, 45 W. Va. (1898) 415, 32 S. E. 283; Barber Asphalt Pav. Co. v. Ridge, 169 Mo. (1902) 376, 68 S. W. 1043; People ex rel. v. Strassheim, 242 Ill. (1909) 359, 90 N. E. 118; People v. Dickerson, 164 Mich. (1910) 148, 129 N. W. 199; Ives v. South Buffalo R. Co., 201 N. Y. (1911) 271, 94 N. E. 431; Carnegie Natural Gas Co. v. Swiger, 72 W. Va. (1913) 557, 79 S. E. 3; Ekern v. McGovern, 154 Wis. (1913) 157, 142 N. W. 595; Frank v. State, 142 Ga. (1914) 741, 83 S. E. 645; State v. Bush, 12 Ala. App. (1915) 309, 68 So. 492; People v. Gordon, 274 Ill. (1917) 462, 113 N. E. 864; In re Opinion of the Justices, 232 Mass. (1919) 601, 123 N. E. 100; St. Louis v. Missouri Pac. R. Co., 278 Mo. (1919) 205, 211 S. W. 671; State v. Felch, 92 Vt. 477, 105 Atl. 23; People v. Lloyd, 304 Ill. (1922) 23, 136 N. E. 505; People v. Keebler, 175 Wis. (1922) 428, 185 N. W. 554.

[32] Hurtado v. California, 110 U. S. (1884) 516 at 535, 28 L. ed. 232.

[33] In re Peterson, 253 U. S. (1919) 300, 64 L. ed. 919.

[34] Freund, Standard of American Legislation, pp. 34-71.

ideas themselves. In the third place it was a concept very similar to that of the inherent principles of society, perhaps indeed its forerunner,[35] which formed one of the most virile portions of due process in the formative period of its development. Thus it may very well happen that the future may bring forth a decision in which these two concepts will be linked together, and the standard of what is to constitute due process of law in matters of procedure may become the fundamental principles of social organization as they have been developed by the common law, but interpreted and applied in the light of modern economic and cultural changes. That there is a tendency to bring these viewpoints together is shown by several *dicta* in the decisions of other courts,[36] and it may very well be doubted if the United States Supreme Court can keep separated two ideas so closely related.

One other aspect of this problem deserves comment. The common-law forms of procedure were quite clearly defined and as a test they had at least the great merit of being accurate and definite. It would seem that the new tests are not nearly as precise and allow much more room for judicial discretion. For this reason it was natural to expect a growth of judge-made law in this field, an expectation which would undoubtedly have been realized but for three factors. In the first place the very fact that the court proposed to adopt such a liberal norm in this class of cases tended to prevent cases being appealed in which it might be applied. The feeling became prevalent that the courts would approve almost any procedure unless it was so grossly and arbitrarily unjust as to be beyond the approval of any reasonable man. As a consequence, cases involving procedure have not been appealed to the Supreme Court in any considerable number in the

[35] Bird, "Evolution of Due Process," Columbia Law Review, Vol. XIII (Jan., 1913), pp. 38-50.

[36] Anderson v. Messenger, 158 Fed. (1907) 250; People v. Dickerson, 164 Mich. (1910) 148, 129 N. W. 190; Ekern v. McGovern, 154 Wis. (1913) 157, 142 N. W. 595; People v. Strassheim, 242 Ill. (1909) 359, 90 N. E. 118; Ives v. South Buffalo R. Co., 201 N. Y. (1911) 271, 94 N. E. 431.

last quarter-century. In the second place the energy of the court has been directed, due to the rapid development of economic legislation as a result of the industrial revolution, towards the development of due process as a restraint on the police power of the states, and frequently cases of procedure have been turned off without an opinion, on account of the pressure of other work.[37] In the last place there is the possibility which must not be ignored, that in the final analysis the principles of the common law, and the principles of social organization, so closely related to them, are capable of being made comparatively constant and well defined quantities. If this be true, a frank recognition of the close relation between the common law and the "blessings of justice and liberty" could only have the most salutary effect upon legal thought. It would tend to restore some of the definiteness which due process of law formerly was thought to have,[38] and at the same time would leave it in that flexible state which is absolutely necessary in a rapidly growing and changing community.

[37] Ascarate v. New Mexico, 245 U. S. (1917) 625, 62 L. ed. 517; Filler v. Steele, 241 U. S. (1915) 648, 60 L. ed. 1220; Zeller v. New Jersey, 231 U. S. (1913) 737, 58 L. ed. 460.

[38] "The term due process of law has a settled and ascertained meaning." Justice Ormond, In re Dorsey, 7 Porter (Ala., 1838) 293. "The meaning of the phrase 'law of the land' is so fully expounded . . . that it would be unnecessary now to dwell upon that subject, as no additional light can be shed upon it. Nothing is left to be done but to apply the principles so well settled to new cases as they may arise before us." Justice Caruthers, Mayor v. Dearmon, 34 Tenn. (1854) 103 at 121, 122.

PART SIX.

CLASSIFICATION.

CHAPTER XV.

DUE PROCESS AND EQUALITY.

§ 99. Professor Freund has observed that before 1830 there were few separate provisions in the state Constitution which guaranteed uniformity in legislation. The principle of equality seems to have been taken for granted, and consequently occupied a very inconspicuous place during the first years of our national growth. From the first there had been certain prohibitions on the granting of titles of nobility, and civil liberty has always been considered one of the foundation stones of the government. But it was not until the state governments had been in operation nearly a half century, that the framers of their constitutions began to provide further restrictions on unequal legislation.[1] It is evident that there were more fundamental causes for this change of attitude than the mere whim of the members of the constitutional conventions, for it was about the same time that the courts were first confronted with problems of equality in enforcing the constitutions.

In the first decisions involving the validity of partial and unequal statutes the courts made no mention of due process of law. The first of these seems to have been a

[1] Ernst Freund, Police Power (Chicago, 1904), p. 629.

North Carolina case in 1804[2] and it was followed by several other decisions during the next two decades.[3] In one of these decisions (Holden v. James), the "law of the land" provisions of the Massachusetts Constitution were mentioned, but the court relied much more on the clauses giving the protection of standing laws and limiting the power of the legislature to suspend the operation of statutes, than it did on the section from Magna Carta.[4] This case aroused considerable discussion, but it is significant that none of the writers who commented on it saw the potential importance of the "law of the land" feature in the decision.[5]

One of this group of decisions involved the validity of the Virginia statutes which disestablished the Episcopal Church. This case was appealed to the United States Supreme Court, and Justice Story, who rendered the opinion for the court, seemed a bit puzzled to know on just what ground to declare it void. The Fifth Amendment did not limit the state legislatures, and consequently had he considered the acts contrary to due process of law, that clause could not have been applied. That he did not mention that section of the constitution is significant, how-

2 Allen v. Peden, 4 N. Car. (1804) 442, 2 Car. L. Rep. 638.

3 Holden v. James, 11 Mass. (1814) 396, 6 Am. Dec. 174; Terrett v. Taylor, 9 Cranch (U. S., 1815) 43, 3 L. ed. 650; Ward v. Barnard, 1 Aikens (Vt., 1825) 121.

4 Holden v. James, 11 Mass. (1814) 396, 3 L. ed. 650, was a case in which an act of the legislature allowed an exception in a particular case to a general law shortening the statute of limitations. The provisions relied upon by the court, in addition to the "law of the land" were as follows:

Article X. "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws."

Article XX. "The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for." Thorpe, Constitutions, Vol. III, pp. 1891-1892.

5 A writer in the American Jurist declared that when the constitutional convention convened there was a proposal to prevent such special legislation but this was rejected. Furthermore between 1776 and 1791 the legislature had enacted fifty-six such special acts. American Jurist, Vol. XIII (1835), pp. 72-105. He was answered by another writer, "C", but he also did not stress the law of the land provision in claiming that the statute was void. American Jurist, Vol. XIV (1835), pp. 83-100.

ever, in view of the fact that he declared the acts void on the ground that they violated the inherent principles of right and justice.[6] A somewhat similar line of reasoning, together with an argument drawn from Blackstone's definition of law, formed the basis on which the Vermont court refused to enforce a special act releasing a debtor from jail.[7] It is evident that although the courts had an inherent aversion to special legislation, they did not think of due process as a possible limitation on it. It is, indeed, surprising that the Kentucky court should have missed that point in the case of Ely v. Thompson.[8] This controversy involved both a question of classification and a question of procedure. The statute was held void on the ground that its procedural features violated due process of law, but nothing was said to indicate that the inequality of it might also conflict with that provision.[9]

[6] "That the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine." Justice Story, Terrett v. Taylor, 9 Cranch (U. S., 1815) 43 at 52, 3 L. ed. 650.

[7] "A prescribed rule of civil conduct, is the correct and universally approved definition of municipal law. So far as an act of the legislature is retrospective, or *ex post facto*, it is not a prescribed rule of conduct. An act conferring upon any one citizen, privileges to the prejudice of another, and which is not applicable to others, in like circumstances, in the language of the learned commentator upon the English law, does not enter into the idea of municipal law, having no relation to the community in general." Ward v. Barnard, 1 Aikens (Vt., 1825) 121 at 128. A similar argument was used in Reed v. Wright, 2 G. Greene (Iowa, 1849) 15; Saco v. Wentworth, 37 Maine (1853) 165, 58 Am. Dec. 786.

[8] Ely v. Thompson, 10 Marsh. (Ky., 1820) 70.

[9] Kentucky statute provided that corporal punishment should be administered to free negroes who raised their hands in opposition to the whites, conviction was to be without trial and simply on an oath of the party against whom the hand had been raised. The court held that this did not give the negro the proper criminal protection but did not mention the classification question. Ely v. Thompson, 10 Marsh. (Ky., 1820) 70. A similar classification was upheld valid in spite of the contention of the attorney that it violated the law of the land. The court admitted that it might guarantee equality but felt the classification was a reasonable one. State v. Manuel, 20 N. Car. (1838) 144.

§ 100. Many of the most arbitrary acts of special legislation during this period were said to impair vested rights and the court was asked to hold them void for that reason. This was the case in the first classification cases to arise in Connecticut,[10] and Tennessee.[11] In the latter state, however, the court ruled that an act of the legislature which merely provided a new remedy, did not violate the "law of the land" even though it was special in its application. This came close to destroying the power of due process as a limitation on equality in that state.[12] In Massachusetts and Pennsylvania the courts applied a similar rule but with less sweeping words. In those states it was held that unless there had been a divesture of a substantial right which had been previously vested, the statute did not violate due process of law even though it were a special one.[13]

[10] Goshen v. Stonington, 4 Conn. (1822) 209, 10 Am. Dec. 121. It was declared that if the law had been unjust it would have been declared void as violating the social compact.

[11] Marr v. Enloe, 1 Yerg. (Tenn., 1828) 452. This was a case involving the summary collection of taxes in one locality. The court declared the statute void.

[12] A slave holder freed his slaves in his will and ordered his property sold for their benefit. In order to provide a remedy for this the legislature passed a special law which was objected to by the sister of the deceased. The court held the law valid. "The legislature did not in the least degree interfere with the power, but left it precisely as it was at the death of the testator." It merely had given a more convenient method of enforcing rights which already existed. "It is not unconstitutional to provide a new or additional remedy for a just right already in being, and which would be lost and destroyed if no remedy were provided." Hope v. Johnson, 2 Yerg. (Tenn., 1826) 123 at 125.

The court likewise upheld a statute giving a more expeditious means by which owners of bank notes under $100 would recover from defaulting banks. The law did not need to apply to all notes or to all banks for there were cases of each where it was not necessary. It is evident, however, that the court would not have upheld it had they considered the classification to have been arbitrary.

Justice Catron, in a concurring opinion, seems to have been the first judge who really caught the significance of the protection of due process of law. He declared: "The clause 'law of the land' means a general and public law, equally binding upon every member of the community. . . .

"The idea of a people through their representatives making laws whereby are swept away the life, liberty and property of one or a few citizens by which neither the representatives nor their other constituents are willing to be bound is too odious to be tolerated." However, he declared that the law before him took nothing away from the plaintiff and so must be upheld. Vanzant v. Waddell, 2 Yerg. (Tenn., 1829) 260 at 271.

[13] The Massachusetts statute affecting a certain will was passed after

As thus developed the rule was followed by the Supreme Court of the United States in the case of Wilkinson v. Leland.[14] It was under this rule, likewise, together with the general power of the state to act as foster parent, that special acts regarding infants' property were upheld.[15]

§ 101. Inasmuch as the courts upheld almost all of these first cases on the ground that no important rights were impaired, there was no need to discuss due process of law. When, however, the courts were brought face to face with more arbitrary laws of this nature, they were forced to find some constitutional basis for their refusal to enforce them. This is clearly shown by the cases arising in Tennessee. In 1831 two cases of special legislation arose, both of which the court found to be so arbitrary that they were declared void. In the first case the court failed to cite the due process provision, basing their opinion rather on the obvious injustice of the act.[16] In the second decision, however, the court realized the weakness of its position in the first case and took great pains to point out exactly how the law violated the "law of the land."[17]

the will had been made but before it had been probated and the court held no right vested until after the probation had been accomplished. Annable v. Patch, 3 Pick. (Mass., 1825) 360.

In Pennsylvania the statute cured the defect in title in the acknowledgment of a *femes covert*. *Dicta* that this is constitutional is to be found in Barnet v. Barnet, 15 Serg. & R. (Pa., 1826) 72, 16 Am. Dec. 516; Tate v. Stooltzfoos, 16 Serg. & R. (Pa., 1827) 35, 16 Am. Dec. 546.

[14] Justice Story declared that a statute which sustained an executor's sale did not arbitrarily transfer property merely because it was retrospective. Hence it was constitutional. He added, "We know of no case in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative powers in any state in the Union." Wilkinson v. Leland, 2 Pet. (U. S., 1829) 627 at 658, 7 L. ed. 542.

[15] Estep v. Hutchman, 14 Serg. & R. (Pa., 1826) 435; Cochran v. Van Surlay, 20 Wend. (N. Y., 1838) 365, 32 Am. Dec. 570. In the latter case the court refused to declare the law void because it was unjust "or from a broad, loose and vague interpretation of a constitutional provision beyond its natural sense." See also Rice v. Parkman, 16 Mass. (1820) 326.

[16] The statute provided that when suits were brought in regard to certain Indian lands, and proof that the suit was being prosecuted in trust was produced, the court should declare that the proof as thus presented was a sufficient bar to the action. Wally's Heirs v. Kennedy, 2 Yerg. (Tenn., 1831) 554, 24 Am. Dec. 511.

[17] A special court with no appeal was provided to try a defaulting bank

It is significant that this case involved a question of criminal procedure since it provided a special court with arbitrary powers for the trial of a single individual. It was probably the procedural aspect of the case, together with the *dictum* in Holden v. James,[18] that brought the court to see the value of the "law of the land" as a limitation on special legislation.[19] But that clause was not only relied upon in condemning the arbitrary procedure prescribed; it also formed the backbone of the court's contention that special legislation violated the constitution. The reasoning of the court in this case was typical of the way by which many of the courts bridge the gap between due process as a procedural limitation and due process as a guarantee of equality. It was first pointed out that due process meant process in a regular court of justice. It was then shown that the phrase was a limitation upon the legislature as well as upon the executive or the courts.[20] With these two premises established, the court concluded that since due process required judicial process, the legislature could not render a judgment which would satisfy its requirements. But special acts of the legislature were by their very nature special or judicial decrees and hence could not be considered valid under the "law of the land."

This line of reasoning appeared most frequently in con-

clerk in the Bank of Tennessee. Each one of the judges noted that the act violated the law of the land. Justice Greene said, "By 'law of the land' is meant a general and public law, operating equally on every individual in the community.

"If the law be general in its operation, affecting all alike, the minority are safe, because the majority, who make the law, are operated on by it equally with the others." State Bank v. Cooper, 2 Yerg. (Tenn., 1831) 599 at 605, 606. A similar law was declared void on the same ground, Budd v. State, 22 Tenn. (3 Humph., 1842) 483, 39 Am. Dec. 189. See also the statement of Justice Manning in Sears v. Cottrell, 5 Mich. (1858) 251.

[18] 11 Mass. (1814) 396.

[19] See especially the reasoning of Justices Peck and Kennedy in this regard. Both of these justices were strongly impressed with the arbitrary procedure provided by the statute. There seem to have been other forces working, however, for Justice Kennedy cited Vanzant v. Waddell, 2 Yerg. (Tenn., 1829) 260, in which Justice Catron had arrived at a similar conclusion. This case also involved a question of procedure. See sec. 100.

[20] This had been already established in a large number of states. See secs. 79-83.

nection with cases involving statutes which deprived officers of their office. The courts of three states used it in declaring void acts ousting officers in public institutions,[21] and the North Carolina court repeated the argument when it refused to enforce a special act depriving a county clerk of his office. Such statutes were really judgments by the legislature and could not possibly be held due process of law, the courts declared, for that protection required a trial before a judicial tribunal.[22] While the rule of law in these decisions (that a public office is a vested right) is generally considered erroneous today,[23] the cases are none the less significant as showing how the concept of special legislation developed out of the procedural aspects of due process.

§ 102. Once the close relationship between equality and due process of law had been established, the courts were not slow to realize how useful it might be. On this ground Tennessee statutes to revive a special judgment or to remedy an individual's loss of rights by latches, were nullified.[24] For the same reasons both the Ten-

[21] A South Carolina statute deprived the professors of the medical college of the right to grant degrees. Judge O'Neall reasoned, "Both by the constitution and the common law, a corporation can only be deprived of its powers, rights, privileges, and immunities, by a judgment of forfeiture obtained according to the law of the land.—By this I understand a trial had, and a judgment pronounced, in the courts of law of this state." State v. Heyward, 3 Rich. (S. Car., 1832) 389 at 412.

In a similar case in Maryland Chief Justice Buchanan said the law of the land was "the general law, prescribed and existing as a rule of civil conduct, relating to the community in general, judicially to be administered by courts of justice." Regents of University of Maryland v. Williams, 9 Gill. & J. (Md., 1838) 365 at 412, 31 Am. Dec. 72. See also Brown v. Hummel, 6 Pa. St. (1847) 86, 47 Am. Dec. 431.

[22] Chief Justice Ruffin said the law of the land "means that such legislative acts, as profess in themselves directly to punish persons or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our forefathers are not effectually 'laws of the land' for those purposes." Hoke v. Henderson, 15 N. Car. (1833) 1 at 14, 25 Am. Dec. 677. See also Taylor v. Stanley, 15 N. Car. (1833) 31; Denny v. Mattoon, 2 Allen (Mass., 1861) 361, 79 Am. Dec. 784.

[23] See *ante*, sec. 91, n. 62.

[24] Justice Peck, in quashing a *scire facias* which had been made possible by a special act, declared that since the law was passed to directly affect

nessee and the Pennsylvania courts refused to enforce retroactive interpretive statutes which impaired vested rights,[25] as well as abuses of the state's right to act as a foster parent.[26] It was but a step from the position that special acts taking away the property of an individual violate due process to the broader view that class legislation which is arbitrary and unwarranted cannot be sustained, and courts were not slow to take this step once they realized the efficacy of the "law of the land" in pro-

this case it could not be law of the land. Tate v. Bell, 4 Yerg. (Tenn., 1833) 202. He also rendered the decision in Officer v. Young, 5 Yerg. (Tenn., 1833) 320, 26 Am. Dec. 268, in which a special act to enable a person to prosecute a suit without taking out letters of administration was declared unconstitutional because it cured a defect due only to negligence of the favored party.

[25] In order better to enable negroes freed by a will to obtain their freedom, the legislature passed a bill allowing them to sue in equity. Fisher's negroes filed such a bill and the legislature passed a law saying that the first act was not intended to apply to cases where the death had occurred prior to its passage. The court held the first of these acts constitutional on the authority of Ann Hope v. Johnson, 2 Yerg. (Tenn., 1828) 123, but the second was declared unconstitutional as being partial and unequal legislation and hence a violation of the law of the land. Fisher's Negroes v. Dabbs, 6 Yerg. (Tenn., 1834) 119.

A Pennsylvania statute interpreting the usury law to the effect that interest of Saving Fund Associations would not be considered usurious was declared void in Reiser v. William Tell Saving Fund Assn., 39 Pa. (1861) 137 at 146.

[26] Under special act of the Tennessee Legislature, land belonging to an infant had been sold. Justice Green pointed out that even though the parties were infants they deserved the protection from arbitrary action, which was to be found in due process of law. Jones Heirs v. Perry, 10 Yerg. (Tenn., 1836) 59, 30 Am. Dec. 430.

Justice Woodward asked how the legislature could take away the property of innocent children without due process when they could not take it from criminals? A special law which does either of these things could not be the law of the land. Shoenberger v. School Directors, 32 Pa. (1858) 34.

Even where the law is distinctly for the benefit of the infant but at the same time impairs the prospective rights of others in the estate after his death Justice Coulter declared a special law to be unwarranted. "If property is subject to the caprice of an annual assemblage of legislators acting tumultuously, and without rule or precedent, and without hearing the party, stability in property will cease, and justice be at an end." Ervine's Appeal, 16 Pa. (1851) 256 at 264, 55 Am. Dec. 499. But where the title did not pass but the land was merely leased for a reasonable period of time no vested rights were impaired and the older doctrine was invoked. An act permitting this was said not to violate due process in Norris v. Clymer, 2 Pa. (1845) 277. Rights are assumed to vest after a decision of an orphan's court has twelve years' standing. Bagg's Appeal, 43 Pa. (1862) 512. See also Burch v. Newbury, 10 N. Y. (1852) 374.

hibiting special acts. Laws tending to cut down the right to sue in the courts, if they were unequal in operation, were the first of this class to be considered,[27] and in at least two states, they were held void.

The largest class of cases, however, where other than individual acts were declared void, were those changing the laws of inheritance for certain groups. If these acts were retrospective in their operation and deprived heirs of property already vested in them, they were invariably declared void. It was for this reason that acts which attempted to redistribute the property of an estate, so that the illegitimate children might share with the legitimate, were nullified.[28] On a similar ground, a New York Statute, changing the rights of husbands in the property of their wives, was declared void as regards those who had married before it was passed.[29] While the question of classification cannot be said to have been the chief point involved in any of these cases, the fact that the courts

27 A statute which prevented suits by individuals when property was held in trust was said to be class legislation contrary to the law of the land. Wally's Heir v. Kennedy, 2 Yerg. (Tenn., 1831) 554, 24 Am. Dec. 511. A statute providing that no claim should be allowed in a probate court unless an oath that the sum was due given in open court in addition to other proof, the act was held to be a bar to small claims and hence class legislation. Riggs v. Martin, 5 Ark. (1844) 506, 41 Am. Dec. 103.

28 In this case the right to the property had already vested in the legitimate children. Chief Justice Gibson pointed out that "the design of the convention was to exclude arbitrary power from every branch of the government; and there would be no exclusion of it, if such rescripts or decrees were allowed to take effect in the form of a statute. The right of property has no foundations or security but the law, and when the legislature shall successfully attempt to overturn it, even in a single instance, the liberty of the citizen will be no more." Norman v. Heist, 5 Watts & S. (Pa., 1843) 171 at 173, 40 Am. Dec. 493. See also Bumberger v. Clippinger, 5 Watts & S. (Pa., 1843) 311; Pocopson Road, 16 Pa. (1857) 15; Butler v. Palmer, 1 Hill (N. Y., 1841) 324.

29 Holmes v. Holmes, 4 Barb. (N. Y., 1848) 295; White v. White, 5 Barb. (N. Y., 1849) 474, 4 How. Pr. 102; Westervelt v. Gregg, 12 N. Y. (1854) 202 at 212, 62 Am. Dec. 160. In the last case Justice Denio pointed out that the statute impaired vested rights and hence violated the law of the land. "The provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the government. . . . No power in the state can legally confer upon one person or class of persons the property of another person or class, without their consent, whatever motives of policy may exist in favor of such transfer." See also Perkins v. Cottrell, 15 Barb. (N. Y., 1851) 446.

seized upon it as an additional objection to the acts, shows the influence which the new conception of due process was having on the judicial mind.[30]

Still another class of cases in which statutes were held void because of unwarranted classification developed in decisions regarding land titles. These cases likewise arose out of the procedural aspects of due process. The court pointed out that a Kentucky statute which provided for the confiscation of all uncultivated or unimproved lands; must be considered either a penal law or a violation of the obligation of contract. If the former, the legislature certainly could not summarily impose a penalty, for to do so would violate the law of the land.[31] In Iowa a statute which singled out half-breed Indians for separate treatment regarding land titles was held void as being arbitrary classification.[32] In New York abuses of the

[30] The rule of law in these cases has since been very materially modified and the power of the legislature to make legitimacy statutes has been recognized; for no one has a vested right in an interest in expectancy. Brewer v. Blaugher, 14 Pet. (U. S., 1840) 178 at 199; Stones v. Keeling, 3 Hen. & M. (13 Va., 1804) 228 note; Rice v. Efford, 3 Hen. & M. (13 Va., 1808) 225; Drake v. Drake, 15 N. Car. (1833) 110; Lincecum v. Lincecum, 3 Mo. (1834) 441; Perry v. Newsom, 36 N. Car. (1840) 28; Edmondson v. Dyson, 7 Ga. (1849) 512; Beall v. Beall, 8 Ga. (1850) 210; Brower v. Bowers, 1 Abb. Dec. (N. Y., 1850) 214; Swanson v. Swanson, 32 Tenn. (2 Swan., 1852) 446; Roby v. Boswell, 23 Ga. (1857) 51; Barbour v. Barbour, 46 Maine (1858) 9; Morgan v. Perry, 51 N. H. (1872) 559; Sewall v. Roberts, 115 Mass. (1874) 262; McGunnigle v. McKee, 77 Pa. St. (1874) 81, 18 Am. Rep. 428; Miller v. Miller, 91 N. Y. (1883) 315, 43 Am. Rep. 669; McKamie v. Baskerville, 86 Tenn. (1888) 459, 7 S. W. 194; In re Jessup, 81 Cal. (1889) 408, 21 Pac. 976, 22 Pac. 742, 1028; Woodward v. Blue, 103 N. Car. (1889) 109, 9 S. E. 492; Irving v. Ford, 179 Mass. (1901) 216, 60 N. E. 491; Houghton v. Dickinson, 196 Mass. (1907) 389, 82 N. E. 481; Stein's Adm'r v. Stein, 32 Ky. L. (1908) 664, 106 S. W. 869; Mund v. Rehaume, 51 Colo. (1911) 129, 117 Pac. 159; Thompson v. Delaware, L. &c. R. Co., 41 Pa. Super. Ct. (1911) 617; Haggard v. Mason, 153 Ky. (1913) 113, 154 S. W. 907; Wolf v. Gall, 32 Cal. App. (1917) 286, 163 Pac. 346, 350; Green v. Kelley, 228 Mass. (1917) 602, 118 N. E. 235; Copeland v. Copeland, 73 Okla. (1918) 252, 175 Pac. 764; Cooley, Constitutional Limitations, pp. 439, 440. Consequently the case of Norman v. Heist has been limited to those cases where the property has actually vested.

[31] "The members of the convention anxious to place the enjoyment of life, liberty, and property upon secure foundations, can not well be imagined to have left all property subject to the absolute and arbitrary control and disposition of the legislature." Justice Underwood, Gaines v. Buford, 1 Dana (Ky., 1833) 481.

[32] The statute provided that lands of half-breeds should be forfeited

power of eminent domain evoked a similar line of argument, which again developed from its procedural aspects. This was one of the strongest of the early due process cases.[33]

§ 103. Although a number of the more advanced courts had worked out quite clearly the reasoning underlying the view that due process of law was a limitation upon arbitrary classification, this line of thought seems not to have become general until after 1870. Before the Civil War only a minority of the justices had even a hazy notion of the scope of this clause, and it is probable that the legal profession generally did not realize its importance. A large number of cases involving the question of classification were presented to the courts during this period, and in most of them the statutes involved were sustained.[34] A study of the opinions in these cases, however, indicates that either the question of due process was never presented for the consideration of the court, or else the justices did not think it of sufficient importance to demand discussion. It seems that the legal profession in most of the states was indifferent to the extension due process had received by such courts as those of Tennessee and Pennsylvania.

unless they registered them within a certain period in the office of the land commissioner. Reed v. Wright, 2 G. Greene (Iowa, 1849) 15. See also Sheppard v. Johnson, 21 Tenn. (1841) 285.

[33] The statute provided that private roads might be laid out without compensation. The court held that this was a legislative transference of property and that due process could have no meaning if the "law of the land" had only reference to a law passed to work the particular wrong. What it did mean was a trial at law and since the legislature did not give one in this class of cases the law was void. Taylor v. Porter & Ford, 4 Hill (N. Y., 1843) 140. See also In re Albany Street, 11 Wend. (N. Y., 1834) 149; Varick v. Smith, 5 Paige (N. Y. Ch., 1835) 137; Bloodgood v. Mohawk & H. R. Co., 18 Wend. (N. Y., 1837) 9, 31 Am. Dec. 313; West River Bridge v. Dix, 6 How. (U. S., 1847) 507, 12 L. ed. 535.

[34] Commonwealth v. Blackington, 41 Mass. (1837) 352; Nagle v. Augusta, 5 Ga. (1848) 546; Lafayette v. Cummins, 3 La. Ann. (1848) 673; Bode v. State, 7 Gill. (Md., 1848) 326; People v. Naglee, 1 Cal. (1850) 232, 52 Am. Dec. 312; Alexandria v. Dearmon, 2 Sneed (Tenn., 1854) 104; Mt. Pleasant v. Clutch, 6 Iowa (1858) 546; Seward v. Beach, 29 Barb. (N. Y., 1859) 239; Halloway v. Police Jury, 16 La. Ann. (1861) 203; Dallas v. Fosdick, 40 How. Pr. (N. Y. 1869) 249; Ditberner v. Chicago, M. &c. R., 47 Wis. (1879) 138, 2 N. W. 69. Notice particularly Roberts v. Boston, 5 Cush. (Mass., 1849) 198.

The ignorance of the possibilities of this clause is shown most clearly by a study of the reasons assigned for declaring arbitrary classifications void. Although the courts were frequently confronted with special acts of a most arbitrary nature which they were constrained to nullify, it was only in a very few cases that they relied upon due process to support their decisions. Indeed, in some cases they had only the most flimsy constitutional grounds for their opinions, and if they had been at all familiar with the decisions of the courts of Tennessee, due process would undoubtedly have been appropriated.

Most of the courts seemed to be groping for some provision in the constitution which might serve as a prop for their opinions. One group seized upon the doctrine of natural rights, particularly as stated in the Declaration of Independence, and declared that since all men were born equal, the legislature could not make them unequal by law.[35] Some of the states have copied that part of the Declaration of Independence into their constitutions, together with a prohibition against the granting of special privileges.[36] With this recognition of the natural right of equality written into the fundamental law, the courts of Mississippi and North Carolina were on firmer ground in declaring unjust classifications void.[37] In a California

[35] Hayden v. Noyes, 5 Conn. (1824) 391; Arrowsmith v. Burlingim, Fed. Cas. No. 563, 4 McLean (1848) 489; Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. (1856) 19. A New York attorney argued that a statute applying only to lawyers was void because of this reason but the court rejected the argument. People v. Walbridge, 6 Cowan (N. Y., 1826) 512. For a revival of this reasoning see the argument of Justice Brewer, Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. (1897) 150 at 157-160, 41 L. ed. 666.

[36] The Mississippi provision was a typical one. "That all freemen, when they form a social compact, are equal in rights; and that no man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services." Mississippi (1832), art. I, sec. 1. Thorpe, Constitutions, Vol. IV, p. 2049.

[37] The Mississippi statute ordered the court to give summary judgment against any one who should jump his bond. The court failed to consider due process in spite of the procedural elements in the case. Smith v. Smith, 2 Miss. (1834) 102. The North Carolina case involved the grant of a monopoly. McRee v. Wilmington & R. Co., 47 N. Car. (1855) 186. Compare the decisions in these cases with Wiley v. Parmer, 14 Ala. (1848) 627,

case it was urged that the provision that "All laws of a general nature shall have a uniform operation,"[38] was violated by a statute which prohibited women working in saloons after midnight.[39] The court rejected this view, although they had refused to enforce a special tax on Chinese miners for less cogent reasons.[40]

§ 104. It is evident that even in those states where the courts had utilized due process to nullify special legislation, some of the justices did not understand its full import. The Supreme Court of Massachusetts had been one of the first to suggest that the "law of the land" might be so construed,[41] but the idea seems not to have struck root in that state. A few years after this early decision that court and its offspring, the Supreme Court of Maine, held special acts of a judicial nature void because they violated the doctrine of the separation of powers.[42] Even

in which the court held a classification void as violating the privileges and immunities of citizens of other states. (United States Const., art. IV, sec. 2.)

38 California (1849), art. I, sec. 11.

39 Ex parte Smith and Keating, 38 Cal. (1869) 702.

40 They declared that it violated the common provision that "Taxation shall be equal and uniform throughout the state," (Cal. (1849), art. XI, sec. 13) and the treaty power of the United States. Lin Sing v. Washburn, 20 Cal. (1862) 534. Chief Justice Field, later in the United States Supreme Court, dissented.

Five years earlier they had refused to enforce a squatter's law which provided that they could be legally ejected only after they had been paid the value of the improvements which had been made. In this case the decision was placed upon an entirely different ground still. Chief Justice Murray declared that "Such legislation is repugnant to the plainest principles of our constitution. It divests vested rights, attempts to take the property acquired by the honest industry of one man and confer it upon another." Billings v. Hall, 7 Cal. (1857) 1. A similar decision was rendered in Arrowsmith v. Burlingim, Fed. Cas. No. 563, 4 McLean (1848) 489. The Indiana court had previously upheld such a statute. Armstrong v. Jackson, 1 Blackf. (Ind., 1825) 374.

41 Holden v. James, 11 Mass. (1814) 396, 6 Am. Dec. 174. See sec. 101.

42 The Maine court declared that it was beyond the powers of the legislature to grant a new trial in a particular case. Lewis v. Webb, 3 Maine (1825) 326; Durham v. Lewiston, 4 Maine (1826) 140. Other cases involving the power of the legislature to interfere in judicial procedure in particular cases are: Calder v. Bull, 3 Dall. (U. S., 1798) 386, 1 L. ed. 648; Sampeyreac v. United States, 7 Pet. (U. S., 1833) 222, 8 L. ed. 665; Freeborn v. Smith, 2 Wall. (U. S., 1864) 160, 17 L. ed. 922; Garrison v. New York City, 21 Wall. (U. S., 1874) 196, 22 L. ed. 612; Freeland v. Williams, 131 U. S. (1889) 405, 33 L. ed. 196; Essex Public Rd. Bd. v. Skinkle,

in Tennessee, which was the cradle of due process as a restriction on classification, the full extent of the courts reasoning was not understood by subsequent justices. As late as 1880 the Supreme Court of that state declared void a statute which exempted members of a fire company

140 U. S. (1891) 334, 35 L. ed. 446; Stephens v. Cherokee Nation, 174 U. S. (1899) 445, 43 L. ed. 1041; Wallace v. Adams, 204 U. S. (1907) 415, 51 L. ed. 547; Merrill v. Sherburne, 1 N. H. (1818) 199, 8 Am. Dec. 52; Bates v. Kimball, 2 D. Chip. (Vt., 1824) 77; Staniford v. Barry, 1 Aikens (Vt., 1825) 314; Hill v. Sunderland, 3 Vt. (1831) 507; Lawrence v. Hicks, 8 Gill & J. (Md., 1836) 386; Prout v. Berry, 2 Gill (Md., 1844) 147; Miller v. State, 8 Gill (Md., 1849) 145; Young v. State Bank, 4 Ind. (1853) 301, 58 Am. Dec. 630; State v. Northern Cent. R. Co., 18 Md. (1861) 193; Barnes v. Barnes, 53 N. Car. (1861) 366; In re Baggs Appeal, 43 Pa. (1862) 512, 82 Am. Dec. 583; Page v. Mathews' Admr., 40 Ala. (1867) 547; Calkins v. State, 21 Wis. (1867) 501; Sanders v. Cabaniss, 43 Ala. (1869) 173; Ex parte Norton, 44 Ala. (1865) 177; McNealy v. Gregory, 13 Fla. (1870) 417; Lawson v. Jeffries, 47 Miss. (1873) 686, 12 Am. Rep. 342; State v. Harmon, 31 Ohio St. (1877) 250; Dodd v. Lyons, 49 N. J. L. (1886) 229, 12 Atl. 542; Germania Sav. Bank v. Suspension Bridge, 159 N. Y. (1899) 362, 54 N. E. 33.

Upon a similar line of reasoning the Massachusetts court refused to recognize a legislative divorce. Simonds v. Simonds, 103 Mass. (1870) 572, 573, 4 Am. Rep. 576. For another case declared void on similar grounds see Picquet, Appellant, 22 Mass. (5 Pick., 1827) 65.

Legislative divorces have been generally sustained. Maynard v. Hill, 125 U. S. (1888) 190, 31 L. ed. 654; Starr v. Pease, 8 Conn. (1831) 541; Clark v. Clark, 10 N. H. (1839) 380, 34 Am. Dec. 165; In re Opinion of the Justices, 16 Maine (1840) 479; Berthelemy v. Johnson, 52 Ky. (1842) 90, 38 Am. Dec. 179; Bingham v. Miller, 17 Ohio (1848) 445, 49 Am. Dec. 471; Jones v. Jones, 12 Pa. (1849) 350, 51 Am. Dec. 611; Levins v. Sleator, 2 G. Greene (Iowa, 1850) 604; Crane v. Meginnis, 1 Gill & J. (Md., 1851) 463, 19 Am. Dec. 237; Wright v. Wright's Lessee, 2 Md. (1852) 429, 56 Am. Dec. 723; Cabell v. Cabell's Adm'rs, 1 Metc. (Ky., 1858) 319; Noel v. Ewing, 9 Ind. (1857) 37; Adams v. Palmer, 51 Maine (1863) 480; Carson v. Carson, 40 Miss. (1866) 349; Cronise v. Cronise, 54 Pa. (1867) 255; Richeson v. Simmons, 47 Mo. (1870) 20. In a number of cases the court has refused to recognize such a divorce. State v. Fry, 4 Mo. (1835) 120; Townsend v. Griffin, 4 Harr. (Del., 1846) 440; Gaines v. Gaines' Ex'r, 9 B. Mon. (Ky., 1848) 295, 48 Am. Dec. 425; Bryson v. Campbell, 12 Mo. (1849) 498; Ponder v. Graham, 4 Fla. (1851) 23; Bryson v. Bryson, 17 Mo. (1853) 590; Chouteau v. Magenis, 28 Mo. (1859) 187; Bryson v. Bryson, 44 Mo. (1869) 232; White v. White, 105 Mass. (1870) 325, 7 Am. Rep. 526; Sparhawk v. Sparhawk, 116 Mass. (1874) 315; Estate of Higbee, 5 West Coast Rep. (1885) 505. Most states have enacted specific constitutional provisions to prohibit abuses which flow from legislative divorces. Index Digest of State Constitutions (N. Y., 1915), p. 535. See also: Teft v. Teft, 3 Mich. (1853) 67; Winkles v. Powell, 173 Ala. (1911) 46, 55 So. 536; Worthington v. District Court, 37 Nev. (1914) 212, 142 Pac. 230.

The South Carolina court has gone so far as to hold that the legislature can not, by special act, permit one individual to bring a suit against the state. Sirrine v. State, 128 S. E. (S. Car., 1925) 172.

from jury service, on the sole ground that the legislature had no power to suspend the law.[43] This is a very

[43] Neely v. State, 72 Tenn. (1880) 316. Similar laws have been upheld, however, in a number of cases. McGunnegle v. State, 6 Mo. (1840) 367; State v. Whitford, 34 N. Car. (1851) 99; Ex parte House, 36 Tex. (1872) 83; Beamish v. State, 65 Tenn. (1873) 530; Ex parte Krupp, 41 Tex. Cr. (1899) 355, 54 S. W. 590. Exemptions of militia men from jury duty have also been upheld. Albert v. White, 33 Md. (1870) 297; Dunne v. People, 94 Ill. (1879) 120, 34 Am. Rep. 213; Ex parte Will, 61 Cal. (1882) 121; Hall v. Judge of Superior Court, 88 Mich. (1891) 438, 50 N. W. 289; Jarvis v. State, 138 Ala. (1903) 17, 34 So. 1025; State v. Miles, 8 Ohio App. (1917) 301; Hay v. Superior Court, 61 Cal. App. (1923) 667, 215 Pac. 717. But this exemption can not act as a bar to service where it is desired by the individual. Hamann v. Heekin, 88 Ohio St. (1913) 207, 102 N. E. 730. In regard to other exemptions from jury duty see: State v. Williams, 18 N. Car. (1835) 372 (Postmasters); People v. Holdridge, 4 Lans. (N. Y., 1871) 511 (Iron workers); State v. Silva, 21 Idaho (1812) 247, 120 Pac. 835 (Clergymen); Mamaux v. United States, 264 Fed. (1920) 816 (Laborers).

Statutory exclusion from jury service on basis of race has been held void. Strauder v. West Virginia, 100 U. S. (1879) 303, 25 L. ed. 664; Neal v. Delaware, 103 U. S. (1880) 370, 26 L. ed. 567; Carter v. Texas, 177 U. S. (1900) 442, 44 L. ed. 839; Commonwealth v. Johnson, 78 Ky. (1880) 509, 1 Ky. L. 108; Cooper v. State, 64 Md. (1885) 40, 20 Atl. 986; Miller v. Commonwealth, 127 Ky. (1907) 387, 105 S. W. 899; State v. Cook, 81 W. Va. (1918) 686, 95 S. E. 792; Ware v. State, 146 Ark. (1920) 321, 225 S. W. 626. But a discrimination against the Chinese has been upheld. State v. Ah Chew, 16 Nev. (1881) 50, 40 Am. Rep. 488.

Racial discriminations due to administrative action are also void. Green v. State, 73 Ala. (1882) 26; Smith v. State, 42 Tex. Cr. (1900) 220, 58 S. W. 97; Whitney v. State, 42 Tex. Cr. (1900) 2 3, 59 S. W. 895; Collins v. State, 60 S. W. (Tex. Cr. App., 1900) 42; Kipper v. State, 42 Tex. Cr. (1901) 613, 62 S. W. 420; Leach v. State, 62 S. W. (Tex. Cr. App., 1901) 422; Smith v. State, 44 Tex. Cr. (1902) 90, 69 S. W. 151; State v. Peoples, 131 N. Car. (1902) 784, 42 S. E. 784; Binyon v. United States, 4 Ind. Terr. (1902) 642, 76 S. W. 265; Smith v. State, 45 Tex. Cr. (1903) 405, 77 S. W. 453; Farrow v. State, 91 Miss. (1908) 509, 45 So. 619; Bonaparte v. State, 65 Fla. (1913) 287, 61 So. 633; Haynes v. State, 71 Fla. (1916) 585, 72 So. 180; State v. Cook, 81 W. Va. (1918) 686, 95 S. E. 792.

It is difficult, however, to prove that discrimination actually exists. Smith v. Mississippi, 162 U. S. (1896) 592, 40 L. ed. 1082; Williams v. Mississippi, 170 U. S. (1898) 213, 42 L. ed. 1012; Martin v. Texas, 200 U. S. (1906) 316, 50 L. ed. 497; Franklin v. South Carolina, 218 U. S. (1910) 161, 54 L. ed. 980; Montgomery v. State, 53 Fla. (1907) 115, 42 So. 894; Washington v. State, 51 Tex. Cr. (1907) 542, 103 S. W. 879; Groce v. Territory, 12 Ariz. (1908) 1, 94 Pac. 1108; Macklin v. State, 53 Tex. Cr. (1908) 197, 109 S. W. 145; State v. Lawrence, 124 La. (1909) 378, 50 So. 406; McIntosh v. State, 56 Tex. Cr. (1909) 134, 120 S. W. 455; State v. Smith, 93 Atl. (R. I., 1915) 353.

Statutory exemption or exclusion of women from jury duty would seem to be valid. In re Mana, 178 Cal. (1918) 213, 172 Pac. 986; People v. Barltz, 212 Mich. (1920) 580, 180 N. W. 423; Commonwealth v. Maxwell,

surprising decision, particularly in view of the fact that the court of that same state had nine years before again led the way in an extension of due process.

From this review of the decisions of this period involving classification, it is evident that the courts were frequently confronted with cases in which they felt the statutes violated the fundamental principles of equality upon which all law is built. Some of the courts had been outspoken enough to say that this was their objection to the statutes. But under the principles of judicial review as they have been evolved by the courts, a statute cannot be declared void unless it transgresses some particular provision of the written constitution.[44] It behooved the attorneys who objected to a statute to find some specific clause which it violated. The difficulty they experienced in finding such a provision to cover cases of arbitrary classification is evident by the variety of sections cited. Not until after the Fourteenth Amendment had been adopted was it pointed out that the due process provision covered more effectively the protection which the court had in mind in seizing upon the other clauses.

Again it was Tennessee that led the way. One of the reconstruction statutes had singled out the tax collector of Roane County for special procedure in settling the taxes he had collected during the Civil War. The court declared it void partly on the ground that the legislature did not have the power to suspend the operation of the law in a particular case, and partly because it violated the "law of the land." The opinion is a very short one and it is evident the court was very sure of its position.[45]

271 Pa. (1921) 378, 114 Atl. 825; State v. Walker, 192 Iowa (1922) 823, 185 N. W. 619; People v. Merhige, 219 Mich. (1922) 95, 188 N. W. 454; State v. Chase, 106 Ore. (1922) 263, 211 Pac. 920; State v. Mittle, 120 S. Car. (1922) 526, 113 S. E. 335; State v. Bray, 153 La. (1923) 103, 95 So. 417; State v. Rosenberg, 155 Minn. (1923) 37, 192 N. W. 194.

[44] J. B. Thayer, Legal Essays (Boston, 1908) pp. 16-33; Harvard Law Review, Vol. VII (Oct., 1893), pp. 140-152; Cooley, Constitutional Limitations (6th ed.), pp. 232-242.

[45] The statute ordered the tax collector of Roane County to return to the county court a schedule of the taxes which he had collected during the Civil War. He failed to do this and the statute required that the circuit

A more elaborate opinion was rendered by the Wisconsin Supreme Court in declaring void a statute that provided that no costs could be collected in any tax case brought against the city of Janesville. Chief Justice Dixon reviewed the decisions of the courts in handling difficult cases of special legislation and noted the variety of grounds upon which they were based. He pointed out that Wisconsin had no "law of the land" provision in her Constitution but declared that the same result could be obtained in a number of ways.[46] Six years later the courts of both Nebraska and Missouri rendered opinions in which they identified "due process of law," "the law of the land," and the doctrine of natural rights.[47] From that time on

court give judgment, on motion of the chairman of the county court, against him upon evidence presented by the order and warrant. The court felt this to be an arbitrary infringement of the rights of the tax collector. State v. Burnett, 53 Tenn. (1871) 186.

Probably more could have been said in regard to the "law of the land" provision in this case had not the court been embarrassed by its earlier decisions in that regard. In Hazen v. Union Bank, 33 Tenn. (1853) 115, a law granting the bank the right to charge interest in excess of the legal rate was upheld in spite of the strenuous objections of the attorney that it violated the law of the land. The court was forced to the somewhat unsatisfactory situation of declaring this a grant or contract, not a public law. A similar law was declared void in Kentucky. Mack v Workingmen's Bldg. & Loan Assn., 5 Ky. L. (1883) 520.

[46] Chief Justice Dixon declared: "The costs here were taxed by the clerk at $141. If successful the city would have recovered them against the plaintiff; but if unsuccessful it is claimed that the plaintiff shall recover nothing. Words can not make the inequality and injustice of the rule plainer than it thus appears; and the question is, whether the legislature can so discriminate between suitors or parties to the same litigation in a court of justice, as that one of them shall have such special and important pecuniary advantage over the other? I, for one, think not; and in declaring my opinion, I care very little whether it is placed on those fundamental principles of law and justice which, in our form of government it has been held no legislative body can override, even though not prohibited by the written constitution, or upon the provisions of the constitution itself, some of which clearly forbid the enactment of such laws." Durkee v. Janesville, 28 Wis. (1871) 464 at 467, 9 Am. Rep. 500. He then cited numerous *dicta* to support the natural justice theory, the theory that the laws violate the equality provision from the Declaration of Independence, the "Law of the land" theory, but finally placed his decision on the provision in the Wisconsin Constitution that the law shall be certain. (Wis. (1848) art. I, sec. 9).

He apparently overlooked the due process provision which had been enacted as part of the Constitution in 1870, or else did not realize that it covered the same ground as the law of the land.

[47] Atchison &c. R. Co. v. Baty, 6 Nebr. (1877) 37, 29 Am. Rep. 356.

the idea that due process was a protection against arbitrary legislative classification gained steadily in favor.

It is important to note that throughout this development each new step was definitely predicated upon the recognition of a former one. Without the acceptance of due process as a procedural protection, it could not have become a limitation upon the power of the legislature. The doctrine that it was a limitation upon class legislation could never have developed until the courts had definitely recognized the law of the land as superior to legislative enactments. In each case the step which the court took was a most natural one. Indeed, in all probability it would have been more generally taken at an earlier period had the need for it been felt. The special restrictions, which had been placed in the constitutions to prevent class legislation, made a development along this line unnecessary for the time being. In fact, they confused the issue and it required the obvious wording of the Fourteenth Amendment to bring the courts back to due process as the most satisfactory general limitation.

The virility of the phrase from Magna Carta is especially noteworthy. Particularly in regard to cases involving special legislation it had very keen competition. But the courts had long been familiar with it, while the newer phrases were ill-understood, and the prestige of the earlier attempt to broaden its meaning could not be overcome. Furthermore, it was evident that due process of law bore a very close relationship to the doctrine of natural rights. This in turn was linked up with the greatest American statement of those rights, the Declaration of Independence. In short, this conception of due process of law

The court declared void a law giving an owner of live stock double damages if they were killed by a railroad. The court held it conflicted with due process in that it singled out the railroads.

In re Jilz, 3 Mo. App. (1877) 243. The court refused to enforce a statute which fixed a different penalty for a crime committed in St. Louis than in the rest of the state on the ground that "due process of law" in the Constitution of 1870 had the same meaning as the "law of the land" in the Constitution of 1765. Both of these clauses prohibited unjust classification.

fitted admirably the American philosophy of government as well as fundamental principles of human relationships.

The courts were largely working in ignorance of this. They were merely attempting to do justice in the particular cases before them. But in thus dealing with concrete problems of social existence, they were in an exceedingly strategic position to develop the equality features of due process of law. The fact that it was a subconscious development makes it all the more significant of the method by which judge-made law develops.

CHAPTER XVI.

THE EQUAL PROTECTION OF THE LAW.

§ 105. In addition to providing that no state shall "deprive any person of life, liberty, or property without due process of law," the Fourteenth Amendment stipulates: "nor deny to any person within its jurisdiction the equal protection of the laws." This phrase was insisted upon by many of the members of Congress because of a sentimental desire to protect the negro in his newly given freedom, but among those versed in constitutional law the demand for the insertion of this provision probably grew out of the great diversity of decisions regarding due process of law which had been rendered by the state courts in the half century preceding the Civil War.[1] We have seen that some of the state courts had failed to find any connection between due process and equality and it was feared that the scope of the protection might not be clear if only the phrase from the Fifth Amendment were incorporated.[2]

Even the courts of some of the most advanced states had failed to see the extensive possibilities of the equality protection bound up in the law of the land. In 1849 the Massachusetts Supreme Court evidently missed complete-

[1] H. T. Leyland, The Concept of Due Process of Law in 1868 and its Influence on the Fourteenth Amendment (Thesis for the Degree of Master of Arts (unpublished), University of Wisconsin, 1922.

[2] "It was not within the power of the states before the adoption of the fourteenth amendment, to deprive citizens of the equal protection of the laws; but there were servile classes not thus shielded, and when these were made freemen, there were some who disputed their claim to citizenship, and some state laws were in force which established discriminations against them. To settle doubts and preclude all such laws, the fourteenth amendment was adopted; and the same securities which one citizen may demand, all others are now entitled to." T. M. Cooley, Treatise on Constitutional Limitations (6th ed., Boston, 1890), 490, 491.

ly the significance of that provision; for they did not mention it in their opinion upholding an act which prohibited colored children attending the same schools as white.[3] It was to prevent a repetition of just such decisions as this that the Joint Reconstruction Committee of Congress proposed the equality provision. For them the phrase referred especially to laws discriminating against the negro, but the statement to this effect in the Slaughter House Case[4] is now recognized as too narrow in view of both the subsequent decisions of the court,[5] and the proceedings in Congress,[6] as well as the plain language of the amendment itself. The provision was much more general both in extent and scope of its application. It was, as Justice Matthews put it some time later, "a pledge of the protection of equal laws."[7]

§ 106. The relation between the two phrases, "due process of law" and "equal protection of the law" has proved one of the enigmas of constitutional law. Some have attempted to distinguish the two protections on the basis of the recognized principle of constitutional construction that no two parts of a document will be construed as covering the same ground.[8] But to reason backward in this matter is dangerous.[9] We have but little evidence on the views of the framers of this section on the relation between its parts. The equality provision

[3] Roberts v. Boston, 5 Cush. (Mass., 1849) 198. Not only was the importance of the law of the land article in this connection missed by Chief Justice Shaw in upholding this law, but it was not mentioned in the very extensive argument of Charles Sumner who attacked the act on practically every other ground. Charles Sumner, Works (Boston, 1875), Vol. II, pp. 327-376.

[4] Justice Miller, after pointing out that the phrase was inserted to protect the negro during the reconstruction period, declared: "It is so clearly a provision for that race and that emergency that a strong case would be necessary for its application to any other." 16 Wall. (U. S., 1873) 36 at 81, 21 L. ed. 107.

[5] This was recognized in Holden v. Hardy, 169 U. S. (1898) 366, 42 L. ed. 780.

[6] See sec. 64.

[7] Yick Wo v. Hopkins, 118 U. S. (1886) 356 at 369, 30 L. ed. 221.

[8] Payne, The Constitution of the United States (Annotated), pp. 45, 46.

[9] For the logical difficulties involved in such reasoning see secs. 109 and 112.

was proposed long before there was any mention of due process, and indeed the Reconstruction Committee was at first unfavorably inclined toward the insertion of the phrase from the Fifth Amendment. Once it was inserted, there is some evidence that it was the due process provision which was considered as the supplementary portion of the clause rather than the equality phrase.[10] This supports Cooley's observation that due process includes the equal protection of the law and more.[11]

Even before the passage of the amendment, the state courts had worked out a fairly intensive, although far from comprehensive, body of law covering arbitrary classification. By the time of the Civil War a number of states had definitely linked this with due process of law.[12] The decisions of the state courts after the adoption of the Fourteenth Amendment continued to consider special and partial laws contrary to the law of the land.[13] But the

10 The statement of Senator Howard bears out this view. H. E. Flack, Adoption of the Fourteenth Amendment (Baltimore, 1908), p. 87.

11 T. M. Cooley, "The Fourteenth Amendment" in Joseph Story, Commentaries on the Constitution of the United States (Boston, 1891), Vol. II, p. 689.

12 See secs. 101-104. In other states (e. g., Kansas and Oregon) this protection is based on special provisions of the constitution of that state. See the Kansas Bill of Rights, sec. 2. After the adoption of the Fourteenth Amendment, these clauses have been generally held to be equivalent to "the equal protection of the law." State ex rel. v. Ferris, 53 Ohio St. 314, 41 N. E. 579; State ex rel. v. Cline, 91 Kans. (1914) 416, 137 Pac. 932; Winters v. Myers, 92 Kans. (1914) 414, 140 Pac. 1033; Black v. State, 113 Wis. 205, 89 N. W. 522; Hume v. Rogue River Pack. Co., 51 Ore. 237, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865.

13 State v. Burnett, 6 Heisk. (53 Tenn., 1871) 186; McKinney v. Memphis Overton Hotel Co., 12 Heisk. (Tenn., 1873) 104; State v. Rauscher, 1 Lea (Tenn., 1878) 96; Davis v. State, 3 Lea (Tenn., 1879) 376; Hatcher v. State, 12 Lea (Tenn., 1883) 368; Millett v. People, 117 Ill. (1886) 294, 7 N. E. 631; State v. Topeka, 36 Kans. (1886) 76, 12 Pac. 310; Stratton v. Morris, 89 Tenn. (1891) 497, 15 S. W. 87; Dugger v. Mechanics & Traders' Ins. Co., 95 Tenn. (1895) 245, 32 S. W. 5; Sutton v. State, 96 Tenn. (1896) 696, 36 S. W. 697; State v. Haun, 61 Kans. (1899) 146, 59 Pac. 340; Williams v. Fears, 110 Ga. (1900) 584, 35 S. E. 699; State ex rel. v. Ashbrook, 154 Mo. (1900) 375, 55 S. W. 627; State v. Hogan, 63 Ohio St. (1900) 202; State ex rel. v. Schlitz Brew. Co., 104 Tenn. (1900) 715, 59 S. W. 1033; State ex rel. v. Condon, 108 Tenn. (1901) 82, 65 S. W. 871; Rodge v. Kelly, 88 Miss. (1906) 209, 40 So. 552; Hyland v. Sharp, 88 Miss. (1906) 567, 41 So. 264; People v. Ronner, 97 N. Y. S. (1906) 550; Malone v. Williams, 118 Tenn. (1907) 390 103 S. W. 798. See also n. 15, 17.

Fourteenth Amendment expressly prohibits the states from denying any person the equal protection of the laws, and it was but natural that the courts should seize upon this specific provision rather than the more general due process clause. Consequently opinions were frequently rendered in which the justices ignored the protection from Magna Carta in favor of the more specific pledge of equality. This tendency is undoubtedly growing. Since 1916 less than one-third of the opinions, in decisions nullifying legislations because of the arbitrary classifications involved, mentioned due process at all.[14]

But the older protection was by no means forgotten. In spite of the fact that in a few cases the courts seemed to make a deliberate effort to keep the provisions separate, the meaning of the two phrases was so completely fused in the judicial mind that this was frequently impossible.[15] No state court has attempted to point out any

[14] Opinions rendered in decisions nullifying state laws because of the classification involved may be grouped into three classes. The first of these places the basis for the decision solely on repugnance to "equal protection of the law" or some equivalent phrase in the state constitution; the second declares the law void because it violates both "equal protection" and "due process"; the third does not mention specifically either phrase from the Fourteenth Amendment but merely declares the law discriminatory or refers in a general way to the amendment. From 1916 to 1925, 90 laws have been declared void in state courts as follows:

Repugnance to equal protection	45
Repugnance to due process and equal protection	25
Clause not specifically stated	20

For an excellent example of the first class of opinion see Vietti v. Mackie Fuel Co., 109 Kans. (1921) 179, 197 Pac. 881. For an example of the second see People v. Schaeffer, 310 Ill. (1923) 574, 142 N. E. 248. For a good example of the third see Wisconsin Assn. of Master Bakers v. Weigle, 167 Wis. (1918) 569, 168 N. W. 383.

[15] A few courts kept the portions violating due process quite distinct from those violating "equal protection.' People v. Sisson, 101 Misc. (1917) 186, 166 N. Y. S. 781; Lockhart v. Anderson, 62 Okla. (1917) 209, 162 Pac. 946; Brown v. Boston &c. R., 233 Tenn. (1919) 502, 124 N. E. 322; Sperry & H. Co. v. State, 188 Ind. (1919) 173, 122 N. E. 584. Most of the courts lumped the two protections together even if they tried to keep them separate. In re Rochester, 184 App. Div. (1918) 369, 171 N. Y. S. 12; Anderson v. Shepard, 285 Ill. (1918) 544, 121 N. E. 215; Anderson v. Uncle Sam Oil Co., 106 Kans. (1920) 483, 186 Pac. 198; Wedesweiler v. Brundage, 297 Ill. (1921) 228, 130 N. E. 520; Lossing v. Hughes, 244 S. W. (Tex. Civ. App., 1922) 556; State v. Martin, 193 Ind. (1923) 120, 139 N. E. 282; Superior Laundry Co. v. Rose, 193 Ind. (1923) 138, 137 N. E. 761; 139 N. E. 142; People v. Chicago, M. &c. R. Co., 306 Ill. (1923)

protection which is secured by the equal protection of the law and not by due process.[16] On the contrary in a very considerable number of cases the court has unconsciously or even purposely made it clear that it looked upon the more general phrase as including the more specific.[17]

§ 107. The inferior United States courts not only enforce the federal laws made by Congress, but they likewise decide disputes between citizens of different states in which they apply state laws. In addition to these functions the Circuit Courts of Appeals hear appeals on questions of constitutionality from the courts of the states. They, therefore, frequently have occasion to nullify discriminatory acts passed by the state legislatures as well as those passed by Congress. As early as 1882, Justice Field,

486, 138 N. E. 155; People v. Schaeffer, 310 Ill. (1923) 574, 142 N. E. 248; Edwardsville v. Illinois Bell Tel. Co., 310 Ill. (1924) 618, 142 N. E. 197.

[16] The nearest to such an opinion was in Sperry & Hutchinson Co. v. State, 188 Ind. (1919) 173, 122 N. E. 584, in which a law licensing the issuance of trading stamps was declared valid as regards due process but void as a denial of the equal protection of the law. The reasoning of the court, however, does not indicate any difference between these two ideas other than to stress the procedural aspects of due process.

[17] "Due process of law guaranteed by the federal constitution has been defined in terms of the equal protection of the laws, that is, as being secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." Barrington v. Barrington, 206 Ala. (1921) 192 at 193, 194, 89 So. 512 at 513.

"The contention that it abridges the privileges and immunities of citizens and denies equal protection of the law is included within the objection that it denies 'due process.' They stand or fall together." People v. Max, 70 Colo. (1921) 100 at 114, 198 Pac. 150 at 156.

See also Commonwealth v. Hana, 195 Mass. (1907) 262 at 267, 81 N. E. 149; Kiley v. Chicago, M. &c. R. Co., 142 Wis. (1910) 154, 125 N. W. 464; Ladd v. Minneapolis, St. P. &c. R. Co., 142 Wis. (1910) 165, 125 N. W. 468; Hall v. State, 124 Tenn. (1911) 235, 137 S. W. 500; Sheldon v. Hoyne, 261 Ill. (1913) 222, 103 N. E. 1021; Pullman Co. v. Knott, 70 Fla. (1915) 9, 69 So. 703; People v. Gordon, 274 Ill. (1916) 462 at 475, 113 N. E. 864; State v. Wisconsin, Minnesota L. &c. Co., 165 Wis. (1917) 430, 162 N. W. 433; Casparis Stone Co. v. Industrial Board, 278 Ill. (1917) 77, 115 N. E. 822; State v. Shapiro, 131 Md. (1917) 168, 101 Atl. 703; Schumacher v. Pennsylvania R. Co., 106 Misc. (1919) 564, 175 N. Y. S. 84; State v. Crosson, 33 Idaho (1920) 140, 190 Pac. 922; Vincent v. Seattle, 115 Wash. (1921) 475, 197 Pac. 618; Pauly v. Keebler, 175 Wis. (1921) 428, 185 N. W. 554; Lossing v. Hughes, 244 S. W. (Tex. Civ. App., 1922) 556; Robertson v. Southeastern Exp. Co., 130 Miss. (1923) 305, 94 So. 210.

then on the federal Circuit Court, intimated that the equality provision might be construed as adding something to due process of law,[18] and in a number of subsequent cases the lower federal courts either carefully separated the discussion of due process from that of equal protection,[19] or made no mention of the general phrase.[20] In the New Haven case Justice Putnam admitted that in some points due process overlapped the equality clause but added bluntly that there was a difference between the two protections.[21] This *dictum* was followed by other federal courts in three cases during the next five years.[22] In each of these cases, however, the statements were purely *dicta*. Every case involved the power of the federal government to classify its legislation, and in each case it was declared that, had the Fourteenth Amendment applied to Congress, the case would have been no different. Even if due process included the equal protection of the law, the classification was not of such an arbitrary nature that it was unconstitutional. On the other hand, in a number of cases the inferior federal courts have either treated due process as including the equal protection of the law, or else they have hopelessly confused the two.[23] An Act of congress imposed a license fee upon all stock-brokers doing busi-

[18] "No state shall touch the life, the liberty, or the property of any person, however humble his lot or exalted his station, without due process of law; and no state, even with due process of law shall deny to any one within its jurisdiction the equal protection of the laws." Railroad Tax Cases, 13 Fed. (1882) 722. See also, In re Sing Lee, 54 Fed. (1893) 334.

[19] Geiger-Jones Co. v. Turner, 230 Fed. (1916) 233, reversed on other grounds, Hall v. Geiger-Jones Co., 242 U. S. (1917) 539, 61 L. ed. 480.

[20] Louisville & N. R. Co. v. Bosworth, 230 Fed. (1915) 191; Union Terminal Co. v. Turner Const. Co., 247 Fed. (1918) 727; Thomas v. Kansas City Southern R. Co., 277 Fed. (1921) 708; Leecraft v. Texas Co., 281 Fed. (1922) 918; in Quan Hing Sun v. White, 254 Fed. (1919) 402, no mention was made of any specific phrase.

[21] United States v. New York, N. H. &c. R. Co., 165 Fed. (1908) 742 at 745, 746.

[22] Watson v. St. Louis I. M. &c. R. Co., 169 Fed. (1909) 942 at 946 (affirmed without opinion, 223 U. S. (1911) 745, 56 L. ed. 639); Coca-Cola Co. v. Nashville Syrup Co., 200 Fed. (1912) 153, 155; Siddons v. Edmonston, 42 App. D. C. (1914) 459 at 466.

[23] In re Parrott, 1 Fed. (1880) 481; United States v. Billings, 190 Fed. (1911) 359; Kroschel v. Munkers, 179 Fed. (1910) 961; Directors of Miller Levee Dist. No. 2 v. Prairie Pipe Line Co., 292 Fed. (1923) 474.

ness in the District of Columbia, and provided that the fee should be $250 per annum if the broker resided within the District but only $100 per annum if the broker lived elsewhere. The Court of Appeals of the District held this feature of the act unconstitutional on the express ground that it was a discriminatory tax and, therefore, was a taking of property without due process of law.[24]

[24] Justice Shepard declared: "It must be conceded that the 14th Amendment, which expressly declares that no state shall deny to any person within its jurisdiction the equal protection of the laws, does not purport to extend to authority exercised by the United States. . . . But it does not follow that Congress in exercising its power of legislation within and for the District of Columbia may therefore, deny to persons residing therein the equal protection of the laws.

"All of the guarantees of the constitution respecting life, liberty, and property are equally for the benefit and protection of all citizens of the United States residing permanently or temporarily within the District of Columbia, as of those residing in the several states. . . ." Lappin v. District of Columbia, 22 App. D. C. (1903) 68 at 75, 31 Wash. L. R. 308. To enforce such a law as was presented in this act, he declared, would violate both due process of law and the principles of free government. Pages 76-79.

He concluded, "The statute, as we are constrained to regard it, by imposing an unreasonable burden upon the right of a citizen to pursue a lawful occupation open to his competitors, upon less onerous terms—which right of occupation is, as we have seen, of the nature of property—operates substantially as the taking of property without due process of law, and is therefore within the prohibition of the 5th Amendment of the Constitution." Page 80. Chief Justice Alvey dissented.

Discriminations in license fees based on residence have been generally declared void. Brown-Forman Co. v. Kentucky, 217 U. S. (1910) 563, 54 L. ed. 883; Chalker v. Birmingham &c. R. Co., 249 U. S. (1919) 522, 63 L. ed. 748; Bethlehem Motors Corp. v. Flynt, 256 U. S. (1921) 421, 65 L. ed. 1029; Williams v. McCartan, 212 Fed. (1914) 345; Oliver v. Washington Mills, 11 Allen (Mass., 1865) 268, 279; Gould & Co. v. Atlanta, 55 Ga. (1876) 678; Lucas v. Macomb, 49 Ill. App. (1892) 60; Indianapolis v. Bieler, 138 Ind. (1894) 30, 36 N. E. 857; Clements v. Casper, 4 Wyo. (1894) 494, 35 Pac. 472; Caldwell v. Prunelle, 57 Kans. (1896) 511, 46 Pac. 949; Commonwealth v. Snyder, 182 Pa. St. (1897) 630, 38 Atl. 356; Leonard v. Reed, 46 Colo. (1909) 307, 104 Pac. 410; Smith v. Farr, 46 Colo. (1909) 364, 104 Pac. 401; Harper v. Galloway, 58 Fla. (1910) 255, 51 So. 226; Jersey City v. Chasan, 81 N. J. L. (1911) 315, 79 Atl. 1058; State v. Williams, 158 N. Car. (1912) 610, 73 S. E. 1000; State v. Doran, 28 S. Dak. (1912) 486, 134 N. W. 53; Moffitt v. Pueblo, 55 Colo. (1913) 112, 133 Pac. 754; Wright v. May, 127 Minn. (1914) 150, 149 N. W. 9; Ideal Tea Co. v. Salem, 77 Ore. (1915) 182, 150 Pac. 852; In re Hines, 33 Cal. App. (1917) 45, 164 Pac. 339; Eales v. Barbourville, 177 Ky. (1917) 216, 197 S. W. 634; In re Hart, 36 Cal. App. (1918) 627, 172 Pac. 610; State v. Mercer, 132 Md. (1918) 263, 103 Atl. 570; Smith v. Mahoney, 22 Ariz. (1921) 342, 197 Pac. 704; Elgin v. Winchester, 300 Ill. (1922) 214, 133 N. E. 205; Real Silk Hosiery Mills v. Bellingham, 1 Fed. (2d) (1925) 934.

This decision seems to have had little influence, however, for it was not cited in the subsequent decisions of the District Courts involving a similar point.

A similar problem was presented to the other federal courts in connection with the provision in the Lever Act which prohibited the hoarding or destruction of necessaries of life in order to enhance prices, but exempted from its operation farmers and co-operative societies. Two federal district courts declared this section void because

This rule seems to have developed out of the interpretation given to article IV, sec. 2, cl. 1, of the United States Constitution: "The Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States"; and Amendment XIV, sec. 1, cl. 2: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Ward v. Maryland, 12 Wall. (U. S., 1870) 418, 20 L. ed. 449; Union Nat. Bank v. Chicago, Fed. Cas. No. 14374 (1871); Ex parte Thornton, 12 Fed. (1882) 538, 547; In re Watson, 15 Fed. (1882) 511; Sinclair v. State, 69 N. Car. (1873) 47; Daniel v. Richmond, 78 Ky. (1880) 542, 1 Ky. L. 256; McGuire v. Parker, 32 La. Ann. (1880) 832; In re Bliss, 63 N. H. (1884) 135; State v. Lancaster, 63 N. H. (1884) 267, 270; Rash v. Holloway, 82 Ky. (1885) 674, 675, 6 Ky. L. 711; Graffty v. Rushville, 107 Ind. (1886) 502, 8 N. E. 609, 57 Am. Rep. 128; Fecheimer v. Louisville, 84 Ky. (1886) 306, 307, 2 S. W. 65; State v. Wiggin, 64 N. H. (1888) 508, 15 Atl. 128, 1 L. R. A. 56; Sayre v. Phillips, 148 Pa. St. (1892) 482, 489, 24 Atl. 76; Commonwealth v. Simons, 15 Pa. Co. Ct. (1894) 550, 551; McGraw v. Marion, 98 Ky. (1896) 673, 675, 34 S. W. 18; Commonwealth v. Myer, 92 Va. (1896) 809, 813, 23 S. E. 915; Rodgers v. Kent Circuit Judge, 115 Mich. (1897) 441, 442, 73 N. W. 381; Cullman v. Arndt, 125 Ala. (1899) 581, 28 So. 70; Angove v. State, 9 Ohio Dec. (1899) 829; In re Jarvis, 66 Kans. (1903) 329, 71 Pac. 576; Bacon v. Locke, 42 Wash. (1906) 215, 83 Pac. 721; Hostetler v. Harris, 45 Nev. (1921) 43, 197 Pac. 697. *Contra:* Beall v. State, 4 Blackf. (Ind., 1835) 107; Sears v. Warren, 36 Ind. (1871) 267, 10 Am. Rep. 62.

The principle exceptions to the rule that license fees which discriminate against non-residents are void, are cases where non-residents occupy an inherently peculiar position, State v. Ware, 79 Ore. (1916) 367, 154 Pac. 905, 155 Pac. 364, and cases in which the state has a proprietary control.

Hunting licenses: In re Eberle, 98 Fed. (1899) 295; State v. Niles, 78 Vt. (1906) 266, 62 Atl. 795; State v. Leavitt, 105 Maine (1909) 76, 72 Atl. 875; State v. Hill, 98 Miss. (1910) 142, 53 So. 411; Bondi v. MacKay, 87 Vt. (1913) 271, 89 Atl. 228; Patsone v. Pennsylvania, 232 U. S. (1914) 138, 58 L. ed. 539; Lacoste v. Department of Conservation, 151 La. (1922) 909, 92 So. 381. *Contra:* State v. Mallory, 73 Ark. (1904) 236, 83 S. W. 955; Harper v. Galloway, 58 Fla. (1910) 255, 51 So. 226; State ex rel. v. Bryan, 87 Fla. (1924) 56, 99 So. 327.

License to graze on public land: Omaechevarria v. Idaho, 246 U. S. (1918) 343, 62 L. ed. 763.

This line of cases is an important illustration of the tendency to bring all protections of private rights under the due process clause.

it violated due process of law in exempting so pertinent a class from its operation.[25]

Perhaps the most important group of cases involving this question arose in connection with the efforts of congress to control the situation which grew out of the housing shortage in Washington during the war. In order to prevent extortionate charges, the Saulsbury Resolution was passed, which prohibited the owner of leased real estate ejecting the tenant as long as the rent was paid, even though the lease had expired. The validity of this resolution came before the courts in two cases and in both of them the justices declared it contrary to due process of law because it discriminated between the landlords with rented and those with unrented property.[26] One of these cases was sustained, without opinion, by the Supreme Court of the United States.[27] An opposite opinion, however, was rendered in the cases involving the validity of the act establishing the Rent Commission. The Supreme Court upheld this act without considering the question of discrimination,[28] although a New York statute which was very similar was declared not to conflict with the equal protection clause.[29] With these decisions before it, the Court of Appeals of the District of Columbia refused to declare the classification features of the rent law contrary

[25] District Judge Anderson declared, "It has been repeatedly held that the phrase 'law of the land' as used in state constitutions, imports a general public law, equally binding upon every member of the community, which embraces all persons who are in or may come into like situations and circumstances, and not partial laws affecting the rights of classes of individuals, and when applied to special or class legislation, it means in addition to that 'the classification must be natural and reasonable, not arbitrary and capricious.'" United States v. Armstrong, 265 Fed. (1920) 683 at 689, 690. "I conclude that an arbitrary classification by Congress is repugnant to the 'due process' clause of the Fifth Amendment." *Ibid.*, 691. See also, United States v. Yount, 267 Fed. (1920) 861. This section of the act was declared void on other grounds by the United States Supreme Court in United States v. Cohen Groc. Co., 255 U. S. (1921) 81, 65 L. ed. 516.

[26] Willson v. McDonnell, 265 Fed. (1919) 432; Groot v. Reilly, 266 Fed. (1919) 1008.

[27] Groot v. Reilly, 254 U. S. (1920) 661, 65 L. ed. 463.

[28] Block v. Hirsh, 256 U. S. (1921) 135, 65 L. ed. 865.

[29] Marcus Brown Holding Co. v. Feldman, 256 U. S. (1921) 170, 65 L. ed. 877.

to due process of law, because they refused to imply that the equal protection of the law applied to Congress.[30] With this conflict of opinion in the lower federal courts, the only solution is to turn to the decision of the Supreme Court of the United States.

§ 108. Here also the problem is not without its difficulties. The Federal Supreme Court has not only frequently linked the two protections together in its treatment of decisions,[31] but toward the end of the Nineteenth Century a number of judges declared in a series of *dicta* that due process guaranteed equal and impartial justice which could only be secured when laws operated on all alike.[32] On the other hand, it is evident that many of

[30] Justice Smith declared: "The Fourteenth Amendment prohibits the denial by any state of the equal protection of its laws to any person within its jurisdiction, and, possibly, under normal conditions, section 106, if passed by a state, would be open to the objection made by counsel for appellants. . . . As the inhibition of the amendment is limited by its terms to legislation by the states, it can hardly be extended to legislation by Congress, unless we imply a limitation which was not expressed. We are not prepared to go that far." Kennedy Bros. v. Sinclair, 287 Fed. (1923) 972 at 978, 979.

[31] In re Kemmler, 136 U. S. (1880) 436, 34 L. ed. 519; Missouri v. Lewis, 101 U. S. (1880) 22, 25 L. ed. 989; Barbier v. Connolly, 113 U. S. (1885) 27, 28 L. ed. 923; Yick Wo v. Hopkins, 118 U. S. (1886) 356, 30 L. ed. 220; Dow v. Beidelman, 125 U. S. (1888) 680, 31 L. ed. 841; Holden v. Hardy, 169 U. S. (1898) 366, 42 L. ed. 780; Capital City Dairy Co. v. Ohio, 183 U. S. (1902) 238, 46 L. ed. 171; Adair v. United States, 208 U. S. (1908) 161, 52 L. ed. 436; Buchanan v. Warley, 245 U. S. (1917) 60, 62 L. ed. 149; International Harvester Co. v. Missouri, 234 U. S. (1914) 199, 58 L. ed. 1276; Chicago Dock & Canal Co. v. Fraley, 228 U. S. (1913) 680, 57 L. ed. 1022; Bunting v. Oregon, 243 U. S. (1916) 426, 61 L. ed. 830; Power Vein Coal Co. v. Industrial Board of Ind., 255 U. S. (1921) 144, 65 L. ed. 555; Terrace v. Thompson, 263 U. S. (1923) 197, 68 L. ed. 255; Lacoste v. Department of Conservation of La., 263 U. S. (1924) 545, 68 L. ed. 437; Wagner Elec. Mfg. Co. v. Lyndon, 261 U. S. (1922) 614, 67 L. ed. 827.

[32] This series of *dicta* began with a statement of Justice Field in Dent v. West Virginia, 129 U. S. (1889) 114, 32 L. ed. 623: "Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters." Page 124.

The most common form of the *dicta* was that of Chief Justice Fuller in Leeper v. Texas, 139 U. S. (1891) 462, 35 L. ed. 225. "Due process is so secured by laws operating on all alike, and not subjecting the individual

the members of the court wished to leave this question open,[33] and some even intimated that a distinction between these two protections might be found.[34] In one case it was even hinted that congress might pass discriminatory legislation.[35] But in each of these cases the

to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice." Page 468. See also, Caldwell v. Texas, 137 U. S. (1891) 692 at 697, 34 L. ed. 816; Giozza v. Tiernan, 148 U. S. (1893) 657 at 662, 37 L. ed. 599; Duncan v. Missouri, 152 U. S. (1894) 377 at 382, 38 L. ed. 485; Florida Cent. &c. R. Co. v. Reynolds, 183 U. S. (1901) 471 at 476, 477, 46 L. ed. 283.

In Smyth v. Ames, 169 U. S. (1898) 466, 42 L. ed. 819, Justice Harlan treated the two phrases as identical. In other cases there seems to have been a deliberate attempt to keep the two protections separate. Missouri Pac. R. Co. v. Mackey, 127 U. S. (1888) 205, 32 L. ed. 107; Baker v. Druesedow, 263 U. S. (1923) 137, 68 L. ed. 212; Radice v. New York, 264 U. S. (1924) 292, 68 L. ed. 690; Cotting v. Kansas City Stock Yards Co., 183 U. S. (1901) 79 at 115, 46 L. ed. 92.

[33] In a number of cases in which state laws were held void on classification grounds no mention was made of due process but the decisions put only on the basis of the equal protection of the law or simply the Fourteenth Amendment. McFarland v. American Sugar Refin. Co., 241 U. S. (1916) 79, 60 L. ed. 899; Royster Guane Co. v. Virginia, 253 U. S. (1920) 412; Bethlehem Motors Corporation v. Flynt, 256 U. S. (1921) 421, 65 L. ed. 1029; Chicago &c. R. Co. v. Nye Schneider Fowler Co., 260 U. S. (1923) 35, 67 L. ed. 115.

[34] Justice Matthews declared, "The conclusion is equally irresistible that when the same phrase [due process of law] was employed in the Fourteenth Amendment to restrain the action of the states, it was used in the same sense and with no greater extent" than in the Fifth Amendment. Hurtado v. People, 110 U. S. (1883) 516 at 534, 535, 28 L. ed. 232.

Justice White stated, "Conceding merely for the sake of argument that the due process clause of the Fifth Amendment, would avoid an exertion of the taxing power which, without any basis for classification arbitrarily taxed one article and excluded an article of the same class, such concession would be wholly inapposite to the case in hand." McCray v. United States, 195 U. S. (1904) 27 at 61, 49 L. ed. 78.

Justice Van Devanter said, "Even if it be assumed that that clause [due process of law] is equivalent to the 'Equal protection of the laws' clause of the Fourteenth Amendment, which is the most that can be claimed for it here, it does not take from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities." Second Employers' Liability Cases, 223 U. S. (1912) 1 at 52, 53, 56 L. ed. 327.

Justice McKenna declared, "Assuming, therefore, and assuming only, not deciding that congress may not discriminate in its legislation, it certainly has the power of classification, and the act of March 2 is well within such power." United States v. Heinze, 218 U. S. (1910) 532 at 546, 54 L. ed. 1139.

See also United States v. Delaware &c. R. Co., 213 U. S. (1909) 366, 53 L. ed. 836; Flint v. Stone Tracy Co., 220 U. S. (1910) 107, 55 L. ed. 389; Lewis Pub. Co. v. Morgan, 229 U. S. (1912) 288, 57 L. ed. 1190.

[35] District of Columbia v. Brooke, 214 U. S. (1908) 138, 53 L. ed. 941.

statements of the court were purely *dicta,* the justices being careful to point out that the statute complained of was not unreasonable in its classification, and so could not be said to violate due process of law even if that clause included the equal protection concept.

Even in those cases involving the power of taxation, the statements of the court in this regard can hardly be said to be more than *dicta.* In this particular group of cases, during the last decade these *dicta* have become so strong and have been so frequently repeated that it can no longer be doubted that congress has a very wide power in classification for purposes of taxation.[36] But no

[36] The best statement of this view is that of Chief Justice White in Brushaber v. Union Pac. R. Co., 240 U. S. (1916) 1 at 24, 60 L. ed. 493, "So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause." Treat v. White, 181 U. S. (1901) 264, 45 L. ed. 853; Patton v. Brady, 184 U. S. (1902) 608, 46 L. ed. 713 (at p. 24).

See also: McCray v. United States, 195 U. S. (1904) 27, 49 L. ed. 78, and the authorities there cited; Galveston, H. &c. R. Co. v. Texas, 210 U. S. (1908) 217, 52 L. ed. 1031; Flint v. Stone Tracy Co., 220 U. S. (1911) 107, at 154, 158, 55 L. ed. 389; Clement Nat. Bank v. Vermont, 231 U. S. (1913) 120, 58 L. ed. 147; Billings v. United States, 232 U. S. (1914) 261, 58 L. ed. 596; St. Louis S. W. R. Co. v. Arkansas ex rel., 235 U. S. (1914) 350, 59 L. ed. 265; Northwestern Mut. L. Ins. Co. v. Wisconsin, 247 U. S. (1918) 132, 62 L. ed. 1025; Shaffer v. Carter, 252 U. S. (1920) 37, 64 L. ed. 445; Royster Guano Co. v. Virginia, 253 U. S. (1920) 412, 64 L. ed. 989; Dane v. Jackson, 237 Mass. (1920) 50, 129 N. E. 606; affirmed 256 U. S. (1921) 589, 65 L. ed. 1107; La Belle Iron Works v. United States, 256 U. S. (1921) 377, 65 L. ed. 998; Lacoste v. Department of Conser., 263 U. S. (1924) 545, 68 L. ed. 437; Wallace v. Myers, 38 Fed. (1889) 184; W. C. Peacock & Co. v. Pratt, 121 Fed. (1903) 772; St. Louis, I. M. &c. R. Co. v. Davis, 132 Fed. (1904) 629; Union Sulphur Co. v. Reed, 249 Fed. (1918) 172; Air-Way Elec. Appliance Corp. v. Archer, 279 Fed. (1922) 878; Simpson v. Hopkins, 82 Md. (1896) 478, 33 Atl. 714; Knisely v. Cotterel, 196 Pa. St. (1900) 614, 46 Atl. 861; State v. Wheeler, 141 N. Car. (1906) 773, 53 S. E. 358; State v. McCrillis, 28 R. I. (1907) 165, 66 Atl. 301; Morrell Refrigerator Car Co. v. Commonwealth, 128 Ky. (1908) 447, 108 S. W. 926; Board of Commrs. v. Johnson, 173 Ind. (1910) 76, 89 N. E. 590; Smith v. Stephens, 173 Ind. (1910) 564, 91 N. E. 167; Territory v. Pinney, 15 N. Mex. (1910) 625, 114 Pac. 367; Alderman v. Wells, 85 S. Car. (1910) 507, 67 S. E. 781; Manhattan Real Est. Co. v. Fitz, 137 N. Y. S. (1912) 864; State ex rel. v. Frear, 148 Wis. (1912) 456, 134 N. W. 673, 135 N. W. 164; Northwestern Mut.

case has arisen in which the law was obviously a special one, and in the most recent decision of this line of cases, the court indicated that should such a case arise, it would not hesitate to declare it void as contrary to due process of law.[37] Furthermore, in none of these cases has there been any attempt to distinguish between the scope of the protection secured by the equal protection clause and that protected by the due process provision.

§ 109. It was not until 1921 that any American court undertook to indicate where the distinction between equal protection and due process might lie. In his opinion in the case of Truax v. Corrigan, Chief Justice Taft stated that the equal protection phrase was not aimed to limit congressional action.[38] He admitted that the due process provision might imply the fundamental elements of equality, but in addition to those he looked toward reaches of that concept which are not protected by the Fifth Amendment. These, he declared, are secured only by the equality provision in the Fourteenth Amendment.[39] Such

L. Ins. Co. v. State, 163 Wis. (1915) 484, 155 N. W. 609, 158 N. W. 328; In re Gross Production Tax of Wolverine Oil Co., 53 Okla. (1916) 24, 154 Pac. 362; Howell v. Edwards, 89 N. J. L. (1917) 713, 99 Atl. 1070; Bankers Tr. Co. v. Blodgett, 96 Conn. (1921) 361, 114 Atl. 104; State v. Zimmerman, 181 Wis. (1924) 552, 196 N. W. 848.

[37] La Belle Iron Works v. United States, 256 U. S. (1921) 377 at 392, 393, 65 L. ed. 998.

[38] "The equality clause of the Fourteenth Amendment does not apply to congressional but only to state action." Truax v. Corrigan, 257 U. S. (1921) 312 at 340, 66 L. ed. 254.

[39] "This brings us to consider the effect in this case of that provision of the Fourteenth Amendment which forbids any state to deny to any person the equal protection of the laws. The clause is associated in the amendment with the due process clause and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. The due process clause brought down from Magna Charta was found in the early state constitutions and later in the Fifth Amendment to the federal constitution as a limitation upon the executive, legislative and judicial powers of the federal government, while the equality clause does not appear in the Fifth Amendment and so does not apply to congressional legislation. The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, prop-

a strong statement from so eminent a jurist is of the highest importance, and the case in which it arose is deserving of the closest scrutiny.

The argument of the Chief Justice was to the effect that, even though it might be contended that the discrimination under consideration did not violate due process of law, it did prevent a person from being protected by equal laws. The statute, as he pointed out, created one set of remedies by which ordinary tort-feasors might be held responsible for their acts and another kind of remedy in case those committing the torts were strikers. Furthermore, the only remedy which an employer could have against his striking employees was a suit for damages and this was so inadequate that in reality it left him with no effective recourse in law. Consequently the act violated the equal protection of the law; because that protection is a pledge that all shall have like access to the courts for like injuries.[40] The reasoning is close, accurate, and in the Chief Justice's best style, but it may nevertheless be questioned if this statute might not likewise have been considered a violation of due process of law in this respect as well as a violation of the equality clause.[41]

The attempt to distinguish between the meaning of

erty and immunities under the protection of the general rules which govern society. . . . . It of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws not of men,' 'No man is above the law,' are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws. But the framers and adopters of this amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.

"The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process." Chief Justice Taft, Truax v. Corrigan, 257 U. S. (1921) 312 at 331-333, 66 L. ed. 254.

[40] Truax v. Corrigan, 257 U. S. (1921) 312, 66 L. ed. 254.

[41] See E. S. Corwin, "Constitutional Law in 1921-1922," American Political Science Review, Vol. 16 (Nov., 1922) pp. 612-639 at 634, 635, n. 96.

these two phrases was the result of the insistence of the four dissenting justices on the proposition that "no one has a vested interest in any rule of law."[42] If the rules of legal remedies may be changed by the legislature at will without violating the due process provision, the statute undoubtedly would have been held valid, unless it was prohibited as a denial of the equal protection of the law. But the courts have frequently held that the legislature has a very wide control over legal remedies. Particularly in the case of employer's liability laws, a wide discretion may be exercised in changing the common law rules.[43] Some have concluded from the liberality of the courts in this class of cases, that the legislature is not limited by due process of law in altering rules of the common law. This rests on the assumption that the law of the land does not include the protection of equal laws and justice to all, which is to be found in some of the state constitutions.[44] Without such an assumption it is difficult to see why a distinction was necessary between the two clauses in the Fourteenth Amendment in the case under discussion.[45]

42 "That no person has a vested interest in any rule of law, entitling him to have it remain unaltered for his benefit, is a principle thoroughly settled by numerous decisions of this court, and having a general application, not confined at all to the rights and liabilities existing between employers and employees, or between persons formerly occupying that relation." Justice Pitney, Truax v. Corrigan, 257 U. S. (1921) 312 at 348-350, 66 L. ed. 254. See argument of Brandeis, J., *Ibid.*, 372-376.

43 In the following cases particularly significant changes in common law remedies were upheld: Munn v. Illinois, 94 U. S. (1876) 113 at 134, 24 L. ed. 77; Martin v. Pittsburgh &c. R., 203 U. S. (1906) 284 at 294, 51 L. ed. 184; The Lottawanna, 21 Wall. (U. S., 1875) 558 at 577, 22 L. ed. 654; Western Union Tel. Co. v. Commercial Mill. Co., 218 U. S. (1910) 406 at 417, 54 L. ed. 1088; Second Employer's Liability Cases, 223 U. S. (1912) 1, 56 L. ed. 327; New York Central R. Co. v. White, 243 U. S. (1916) 188 at 198, 61 L. ed. 667; Chicago &c. R. v. Tranbarger, 238 U. S. (1914) 67 at 76, 59 L. ed. 1204. The Workmen's Compensation Cases are collected in sec. 96, n. 21.

44 The provision in the Ohio Constitution of 1851 is typical. "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation shall have remedy by due course of law; and rights and justice administered without denial or delay." Article I, sec. 16, Thorpe, Constitutions, Vol. V, p. 2915.

45 Chief Justice Taft evidently considered that the due process provision did not secure a full pledge of equal laws. He cited the often quoted words

§ 110. There are a number of other cases in which the courts have refused to apply the due process provision. A state legislature may substitute indictment by information by grand jury and may compel individuals to testify against themselves, without violating it.[46] It may deprive a corporation of its liberty or even life and still not deny it due process,[47] and it may be doubted if a state law putting a man twice in jeopardy for the same offense would be invalid on that ground.[48] The question may well be raised, then in view of the *dicta* of the court in the Truax Case, if the legislature may enact any of these laws, which apparently are not prohibited by due process of law, and make them apply only to the colored population. Even if we could assume a situation in which the equal protection clause did not apply, it is hardly conceivable that such laws would be upheld. In all probabil-

of Justice Matthews in the case of Yick Wo v. Hopkins, 118 U. S. (1886) 356, 30 L. ed. 220. "'The equal protection of the laws is a pledge of the protection of equal laws.'

"The accuracy and comprehensive felicity of this description of the effect of the equality clause are shown by the frequency with which it has been quoted in the decisions of this court. It emphasizes the additional guaranty of a right which the clause has conferred beyond the requirements of due process." Truax v. Corrigan, 257 U. S. (1921) 333-334, 66 L. ed. 263

[46] Hurtado v. California, 110 U. S. (1883) 516, 28 L. ed. 232; Twining v. New Jersey, 211 U. S. (1908) 78, 53 L. ed. 97. In both of these cases the law was a general one. See also sec. 96, n. 17.

[47] National Council v. State Council, 203 U. S. (1906) 151, 51 L. ed. 132; Northwestern Life Ins. Co. v. Riggs, 203 U. S. (1906) 243 at 255, 51 L. ed. 168; Western Turf Assn. v. Greenburg, 204 U. S. (1907) 359 at 363, 51 L. ed. 520; Central Pac. R. Co. v. State Board of Equalization, 60 Cal. (1882) 35; Charlotte, C. &c. R. Co. v. Gibbes, 27 S. Car. (1887) 385, 4 S. E. 49; State v. Brown &c. Mfg. Co., 18 R. I. (1892) 16, 25 Atl. 246, 17 L. R. A. 856; State v. Atlantic Coast Line R. Co., 56 Fla. (1908) 617, 47 So. 969, 32 L. R. A. (N. S.) 639; Colby v. Equitable Tr. Co., 192 N. Y. (1908) 535, 84 N. E. 1111; Webster v. Susquehanna P. L. Co., 112 Md. (1910) 416, 76 Atl. 254, 21 Ann. Cas. 357.

[48] The cases in this point are far from clear. The Federal Circuit Court of Appeals has said that due process does protect the accused from double jeopardy. Ex parte Ulrich, 42 Fed. (1890) 587. This has the support of a statement by Justice Harlan. Hurtado v. California, 110 U. S. (1884) 516, 28 L. ed. 232, dissenting at 547.

However, in at least three state decisions *dicta* to the effect that due process does not cover double jeopardy may be found. Brantley v. State, 132 Ga. (1909) 573, 64 S. E. 676, 22 L. R. A. (N. S.) 959, 131 Am. St. 218, 16 Ann. Cas. 1203; Perdue v. State, 134 Ga. (1910) 300, 67 S. E. 810; State v. Manley, 197 Iowa (1924) 46, 196 N. W. 724.

ity they would be declared void on the ground that they transgress the fundamental principles of justice and fair play which are secured by due process of law.[49]

The decisions of the Supreme Court in those cases which involved the power of the state legislatures to change the rules of the common law strengthen this view. In no case has the court applied the doctrine of legislative omnipotence to a capricious change in legal remedies, and Justice Pitney, in the most recent case of this nature, expressly said that this rule would apply if the alterations in the common law were of an arbitrary and unreasonable nature.[50] Some of the state courts have held that due process does secure the right to equality of judicial remedies,[51] and this view seems to have at least the tacit sanction of the Federal Supreme Court.[52] In some states,

[49] The frequent quotation of the famous definition of due process which was given in Bank of Columbia v. Okely, 4 Wheat. (U. S., 1819) 235 at 244, 4 L. ed. 559, indicates how firmly this view of due process is embedded in the judicial mind.

[50] Arizona Copper Co. v. Hammer, 250 U. S. (1919) 400 at 420, 63 L. ed. 1058.

[51] See especially Runge v. Wyatt, 25 Tex. (1860) 291; Florida East Coast R. Co. v. State, 79 Fla. (1920) 66, 83 So. 708; Baker v. Kelly, 11 Minn. (1866) 480. See also: Durkee v. Janesville, 28 Wis. (1871) 464, 9 Am. Rep. 500; Gilchrist v. Schmidling, 12 Kans. (1873) 263; Ehlers v. Stoeckle, 37 Mich. (1877) 261; Reed v. Baker, 42 Mich. (1879) 272, 3 N. W. 959; State v. Cadigan, 73 Vt. (1901) 245, 50 Atl. 1079, 57 L. R. A. 666, 87 Am. St. 714; Rosin v. Lidgerwood Mfg. Co., 89 App. Div. (1903) 245, 86 N. Y. S. 49; Ohio Tpk. Co. v. Waechter, 25 Ohio Cir. (1903) 605; Marshall & Bruce Co. v. Nashville, 109 Tenn. (1903) 495, 71 S. W. 815; Hanson v. Krehbiel, 68 Kans. (1904) 670, 75 Pac. 1041, 64 L. R. A. 790, 104 Am. St. 422; Hoffmann v. Milwaukee E. R. & L. Co., 127 Wis. (1906) 76, 106 N. W. 808; Paris v. Brenneman, 59 Tex. Civ. App. (1910) 464, 126 S. W. 58; Byers v. Meridian Print. Co., 34 Ohio St. (1911) 408, 95 N. E. 917, 38 L. R. A. (N. S.) 913; In re Opinion of the Justices, 211 Mass. (1912) 618, 98 N. E. 337; Bogni v. Perotti, 224 Mass. (1916) 152, 112 N. E. 853; Shellabarger Elev. Co. v. Illinois Cent. R. Co., 278 Ill. (1917) 333, 116 N. E. 170; Maples v. State, 203 Ala. (1919) 153, 82 So. 183; Ex parte Rust, 181 Cal. (1919) 73, 183 Pac. 548; Salant v. Pennsylvania R. Co., 188 App. Div. (1919) 851, 177 N. Y. S. 475; State v. Porter, 94 Conn. (1920) 639, 110 Atl. 59; Scott v. Nashville Bridge Co., 143 Tenn. (1920) 86, 223 S. W. 844; Greenfield v. Central Labor Council, 104 Ore. (1922) 236, 207 Pac. 168. See also secs. 101-104.

[52] Mabee v. McDonald, 107 Tex. (1915) 139 at 144-146, 175 S. W. 676, held that there was no right to equality in legal remedies. This was reversed on other grounds by the United States Supreme Court, no mention being made of this point. 243 U. S. (1916) 90.

indeed, the court has held that it is a denial of this protection to impose conditions on recourse to the courts which would virtually deny a person any practical remedy at law.[53] There can be no doubt, on the authority of both state and federal courts (including statements by Chief Justice Taft)[54] that the due process provision does give the protection of some adequate and appropriate remedy for the vindication of private rights.

If, then, the whole citizenry may not be deprived of their right to pursue an adequate remedy in the courts without depriving them of due process of law, and if, as

[53] Campbell v. Holt, 115 U. S. (1884) 620, 29 L. ed. 483; Iowa Cent. R. Co. v. Iowa, 160 U. S. (1896) 389, 40 L. ed. 467; Riverside Cotton Mills v. Menefee, 237 U. S. (1915) 189, 59 L. ed. 910; Price v. Hopkin, 13 Mich. (1865) 318; Wright v. Cradlebaugh, 3 Nev. (1867) 341; Happy v. Mosher, 48 N. Y. (1872) 313; Brown v. Board of Levee Commrs., 50 Miss. (1874) 468; Clark v. Mitchell, 64 Mo. (1877) 564; Reynolds v. Randall, 12 R. I. (1880) 522; The People ex rel. v. Otis et al., 90 N. Y. (Ct. of Appeals) (1882) 48; Gilman v. Tucker, 128 N. Y. (1891) 190, 28 N. E. 1040 13 L. R. A. 304; Light v. Canadian County Bank, 2 Okla. (1894) 543, 37 Pac. 1075; Gilbert v. Ackerman, 159 N. Y. (1899) 118, 53 N. E. 753, 45 L. R. A. 118; In re Flukes, 157 Mo. (1900) 125, 57 S. W. 545, 51 L. R. A. 176, 80 Am. St. 619; Green v. Port Jervis, 31 Misc. (1900) 59, 64 N. Y. S. 547; Fisher v. Wineman, 125 Mich. (1901) 642, 84 N. W. 1111, 52 L. R. A. 192; Milligan v. Brooklyn Warehouse & S. Co., 34 Misc. (1901) 55, 68 N. Y. S. 744; Follett Wool Co. v. Albany T. W. Co., 61 App. Div. (1901) 296, 70 N. Y. S. 474; Barry v. Port Jervis, 64 App. Div. (1901) 68, 72 N. Y. S. 104; O'Brien v. Flint, 74 Conn. (1902) 502, 51 Atl. 547; Theeni v. Dubuque, 115 Iowa (1902) 482, 88 N. W. 967; Williams v. Port Chester, 72 App. Div. (1902) 505, 76 N. Y. S. 631; Matter of Cullinan, 82 App. Div. (1903) 445, 81 N. Y. S. 567; Riglander v. Star Co., 98 App. Div. (1904) 101, 90 N. Y. S. 772; Badenoch v. Chicago, 222 Ill. (1906) 71, 78 N. E. 31; Swing v. Brister, 87 Miss. (1906) 516, 40 So. 146; Gillett v. Romig, 17 Okla. (1906) 324, 87 Pac. 325; In re Robinson's Est., 112 N. Y. S. (1908) 280; McConnell v. Bell, 121 Tenn. (1908) 198, 114 S. W. 203, 130 Am. St. 770; Eagleson v. Rubin, 16 Idaho (1909) 92, 100 Pac. 705; Modern Loan Co. v. San Francisco Police Ct., 12 Cal. App. (1910) 582, 108 Pac. 56; United Shoe Mach. Co. v. Ramlose, 231 Mo. (1910) 508, 132 S. W. 1133; Tillman v. Tillman, 84 S. Car. (1910) 552, 66 S. E. 1049, 26 L. R. A. (N. S.) 781; Anderson v. Great Northern R. Co., 25 Idaho (1914) 433, 138 Pac. 127, Ann. Cas 1916C, 191; British-American Portland Cement Co. v. Citizens Gas Co., 255 Mo. (1914) 1, 164 S. W. 408, Ann. Cas. 1915C, 151; White v. Powers, 89 Wash. (1916) 502, 154 Pac. 820. See also n. 51.

But of course a state need not provide any means by which a suit can be brought against itself. Carolina Glass Co. v. South Carolina, 240 U. S. (1915) 305, 60 L. ed. 658.

[54] Truax v. Corrigan, 257 U. S. (1921) 333, 66 L. ed. 263. See also Forbes Pioneer Boat Line v. Board of Commrs., 258 U. S. (1922) 338, 66 L. ed. 647; Jones v. Union Guano Co., 264 U. S. (1924) 171, 68 L. ed. 623.

was admitted by Chief Justice Taft, this clause does prohibit certain forms of class legislation, there seems to be no logical basis for holding that discriminatory statutes which alter civil procedure to the serious arbitrary disadvantage of one portion of the population are not likewise contrary to it. Indeed, in view of the early state decisions involving due process,[55] one would think that such a statute would be a denial of it if any inequality would. Unless that protection is "a rope of sand" as far as being a protection against class legislation, those laws which discriminate as to remedies in the courts, must certainly be considered contrary to it.

It is important to remember that this portion of the opinion of Chief Justice Taft was not essential to the decision of this case because the statute involved was a state one, and hence the Fourteenth Amendment could be applied. But, although there was no real necessity for differentiating between due process and equal protection of the law, an effort was made to distinguish between them. The closeness of the reasoning indicates the almost insurmountable difficulty involved in any attempt to differentiate between ideas which are inherently so closely related.[56] We must conclude therefore that in spite of numerous *dicta* to the effect that the phrases are not identical, no court has succeeded in showing just what the "equal protection of the law" adds to "due process of law."[57]

[55] See secs. 100-102.

[56] Justice Lamar declared in Smith v. Texas, 233 U. S. (1914) 630 at 636, 58 L. ed. 1129, "Life, liberty, property and the equal protection of the law, grouped together in the constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three."

[57] Even where the power of the legislature would seem to be well nigh absolute, it is possible that the legislature might be held to the principles of a reasonable classification in their statutes. Thus Congress has a very wide power over the mails. It may classify the articles carried, the rates paid, and even the recipients of matter sent through the mail. Ex parte Jackson, 96 U. S. (1877) 727, 24 L. ed. 877; In re Rapier, 143 U. S. (1892) 110, 36 L. ed. 93; Public Clearing House v. Coyne, 194 U. S. (1904) 497, 48 L. ed. 1092; Lewis Pub. Co. v. Morgan, 229 U. S. (1913) 288, 57 L. ed. 1190; Deggee v. Hitchcock, 229 U. S. (1913) 162, 57 L. ed. 1135; United

§ 111. The views of extra-judicial writers are fully as inconclusive on this matter. Freund pointed out that the two ideas are closely associated in the minds of the courts;[58] Cooley and Taylor asserted that equality was an essential element of due process even before the adoption of the Fourteenth Amendment;[59] while Willoughby and McGehee showed that much of the legislation, which can be considered prohibited by the equality provision, is likewise contrary to due process.[60] The two latter, however, imply that legislation possibly might be passed which would only be prevented by the equality provision.[61] After a careful analysis of the *dicta* on this subject, Burdick draws the conclusion that, "the conception of due process does exclude legislation which inflicts inequality of burden which is clearly arbitrary and without any basis in reason."[62] In view of what has been said, the accuracy of this view can hardly be questioned.[63]

States ex rel. v. Burleson, 255 U. S. (1921) 407, 65 L. ed. 704. Nevertheless, there are indications that even this power may not be entirely unlimited in the matter of classifications permissible. Public Clearing House v. Coyne, 194 U. S. (1904) 497 at 506-508, 48 L. ed. 1092; Lewis Pub. Co. v. Morgan, 229 U. S. (1913) 288 at 313, 57 L. ed. 1190.

At the same time, it may be questioned if unreasonable classification in cases where the government has a proprietary control would violate the "equal protection of the law." The courts of the states are in hopeless conflict in respect to the power of the legislature to discriminate in the matter of granting hunting licenses. See sec. 107, n. 24. It is significant, however, that the California Supreme Court has declared a law discriminating against Indian children in the public schools to be contrary to both "due process" and "equal protection." Piper v. Big Pine School District, 193 Cal. (1924) 664, 226 Pac. 926. It is evident that even in this class of cases there is great difficulty in distinguishing these protections.

[58] Freund, Police Power, sec. 611.

[59] Cooley, Constitutional Limitations, 490, 491; Hannis Taylor, Due Process of Law and Equal Protection of the Laws (Chicago, 1917), p. 307.

[60] "It would seem, however, that the broad interpretation which the prohibition as to 'due process of law' has received is sufficient to cover very many of the acts which, if committed by the states, might be attacked as denying equal protection." Willoughby, Constitutional Law, Vol. II, p. 874; McGhee, Due Process of Law, pp. 60-62, 312.

[61] "Perhaps the same effects might have been attained by the due process clause alone and it will not be possible to separate the cases under the two clauses with rigid distinctness." McGhee, Due Process of Law, p. 311; Willoughby, Constitutional Law, Vol. II, p. 874.

[62] C. K. Burdick, Law of the American Constitution (New York, 1922), sec. 157, p. 419.

[63] For a contrary view see E. C. Hall, "Due Process of Law and Class

§ 112. There is no doubt that the incorporation in the Fourteenth Amendment of an additional safeguard against partial legislation brought forcibly to the attention of the court the necessity of preventing discriminatory laws. Had it not been incorporated in the amendment, the Supreme Court might have developed the equality side of due process very slowly,[64] and consequently, in spite of the due process provision, legislation aimed at the negro might have been successfully enforced. But in view of the inevitable tendency in the state courts, one can hardly doubt that sooner or later the Supreme Court of the United States would have developed such a rule in connection with the more general phrase. The ultimate result would probably have been much the same whether the "equal protection of the law" had been inserted in the constitution or not. There was, however, one danger in incorporating such a provision in the fundamental law. It is an established rule of statutory construction that when specific provisions are mentioned in connection with a general phrase, the more inclusive phrase should be interpreted as excluding the particular one in case it is mentioned elsewhere in the document. The expression of particular parts of a general provision excludes those parts from the larger concept.[65] While it is obvious that this rule cannot be applied with justice to documents made at different times and under different conditions, there still remains the danger that the courts may apply it.

The Supreme Court, however, seems fully aware of the danger involved in pressing rules of construction too

Legislation," American Law Review, Vol. XLIII (Nov., 1909), pp. 926-932: W. D. Guthrie, The Fourteenth Amendment (Boston, 1898), p. 108. Taylor considers the equality provision supplemental to due process but with a broader deeper significance. Taylor, Due Process of Law, p. 46. See also R. J. Swenson, The National Government and Business (N. Y., 1924), pp. 71-72.

64 They even hesitated to develop the equal protection of the law at first, declaring that it applied only to discrimination against the negro. Slaughter House Case, 16 Wall. (U. S., 1873) 36, 21 L. ed. 394.

65 H. C. Black, Handbook on the Construction and Interpretation of the Laws (St. Paul, 1911), sec. 70, p. 202.

far in connection with a Constitution.[66] This appears very clearly in its interpretation of the eminent domain provision in the Fifth Amendment. The states are nowhere in the Constitution expressly prohibited from taking private property for public use without just compensation, but the courts have declared that this protection is included in the general concept of due process of law.[67] It is,

[66] Payne, Constitution of the United States (Annotated), pp. 37, 38.

[67] Head v. Amoskeag Mfg. Co., 113 U. S. (1885) 9, 28 L. ed. 889; Sear. v. School Dist., 133 U. S. (1890) 553 at 562, 33 L. ed. 740; Sweet v. Rechel, 159 U. S. (1895) 380 at 398, 159 L. ed. 188; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. (1896) 112, 41 L. ed. 369; Missouri Pac. R. Co. v. Nebraska, 164 U. S. (1896) 403, 41 L. ed. 489; Chicago, B. &c. R. Co. v. Chicago, 166 U. S. (1897) 226, 41 L. ed. 979; Long Island Water S. Co. v. Brooklyn, 166 U. S. (1897) 685, 41 L. ed. 1165; Wabash R. Co. v. Defiance, 167 U. S. (1897) 88, 42 L. ed. 87; Backus v. Fort St. Union Depot Co., 169 U. S. (1898) 557, 42 L. ed. 853; Meyer v. Richmond, 172 U. S. (1898) 82, 43 L. ed. 374; Baker v. Norwood, 172 U. S. (1898) 269, 43 L. ed. 443; Ohio Oil Co. v. Indiana, 177 U. S. (1900) 190, 44 L. ed. 729; Wheeler v. New York, N. H. &c. R. Co., 178 U. S. (1900) 321, 44 L. ed. 1085; Manigault v. Springs, 199 U. S. (1905) 473, 50 L. ed. 275; West Chicago St. R. Co. v. Illinois, 201 U. S. (1906) 506, 50 L. ed. 845; Offield v. New York, N. H. &c. R. Co., 203 U. S. (1906) 372, 51 L. ed. 231; Hairston v. Danville &c. R. Co., 208 U. S. (1908) 598, 52 L. ed. 637; Otis Co. v. Ludlow Mfg. Co., 201 U. S. (1906) 140, 50 L. ed. 696; Cincinnati, I. &c. R. Co. v. Connersville, 218 U. S. (1910) 336, 54 L. ed. 1060; Appleby v. Buffalo, 221 U. S. (1911) 524, 55 L. ed. 838; Cincinnati v. Louisville &c. R. Co., 223 U. S. (1912) 390, 56 L. ed. 481; Brand v. Union Elev. R. Co., 238 U. S. (1915) 586, 59 L. ed. 1471; McCoy v. Union Elev. R. Co., 247 U. S. (1918) 354, 62 L. ed. 1156; Bragg v. Weaver, 251 U. S. (1920) 57, 64 L. ed. 135; Hays v. Port of Seattle, 251 U. S. (1920) 233, 64 L. ed. 243; Charlotte Harbor R. Co. v. Wells, 260 U. S. (1923) 8, 67 L. ed. 100; Pennsylvania Coal Co. v. Mahon, 260 U. S. (1923) 393, 67 L. ed. 322; Joslin Mfg. Co. v. Providence, 262 U. S. (1923) 668, 67 L. ed. 1167; Barr v. New Brunswick, 67 Fed. (1895) 402; Newburyport Water Co. v. Newburyport, 103 Fed. (1900) 584; Baillie v. Larson, 138 Fed. (1905) 177; Portland R. L. &c. Co. v. Portland, 181 Fed. (1910) 632; Harrison v. Philadelphia, 217 Fed. (1914) 107; Varick v. New York City, 4 Johns. Ch. (N. Y., 1819) 53; Cook v. South Park Commrs., 69 Ill. (1871) 115; People v. Humphrey, 23 Mich. (1871) 471, 9 Am. Rep. 94; Torres, et al. v. Falgoust, 37 La. Ann. (1885) 497; Miller v. Corinna, 42 Minn. (1890) 391, 44 N. W. 127; Stevens v. New York El. R. Co., 8 N. Y. S. (1890) 313; Browning v. Collis, 21 Misc. (1897) 155, 47 N. Y. S. 76; People v. Adirondack R. Co., 160 N. Y. (1899) 225, 54 N. E. 689; Roudebush v. Mitchell, 154 Ind. (1900) 616, 57 N. E. 510; In re Tuthill, 163 N. Y. (1900) 133, 57 N. E. 303, 49 L. R. A. 781, 79 Am. St. 574; Gilmer v. Hunnicutt, 57 S. Car. (1900) 166, 35 S. E. 521; Painter v. St. Clair, 98 Va. (1900) 85, 38 S. E. 989; Savannah, F. &c. R. Co. v. Postal Tel. & C. Co., 115 Ga. (1902) 554, 42 S. E. 1; Phillips v. Postal Tel. & C. Co., 130 N. Car. (1902) 513, 131 N. Car. (1902) 225, 41 S. E. 1022, 42 S. E. 587; In re Seattle, 42 Wash. (1906) 551, 85 Pac. 45; State ex rel. v. Board of Suprs. of Rockford, 102 Minn.

therefore, an implied limitation upon the states growing out of the Fourteenth Amendment. There can be no doubt of the accuracy of the cases which hold this, even though they are contrary to the rule that a general clause does not include a specific one associated with it. It is significant, moreover, that the specific provision in this case was omitted when the more general one was subsequently repeated.[68] The natural conclusion would be that it was

(1907) 442, 114 N. W. 244; In re Water Front on North River, 190 N. Y. (1907) 350, 83 N. E. 299, 16 L. R. A. (N. S.) 335, 13 Ann. Cas. 598, 105 N. Y. S. 750; Wilburn v. Raines, 111 Va. (1910) 334, 68 S. E. 993; Commissioners of Lincoln Park v. Fahrney, 250 Ill. (1911) 256, 95 N. E. 194; Calor Oil &c. Co. v. Withers, 141 Ky. (1911) 489, 133 S. W. 210; Western & A. R. Co. v. Western Union Tel. Co., 138 Ga. (1912) 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225; People ex rel. v. Priest, 206 N. Y. (1912) 274, 99 N. E. 547; Roanoke Rapids Power Co. v. Roanoke Nav. &c. Co., 159 N. Car. (1912) 393, 152 N. Car. (1910) 472, 68 S. E. 190, 75 S. E. 29; Southern R. Co. v. Memphis, 126 Tenn. (1912) 267, 148 S. W. 662, 41 L. R. A. (N. S.) 828; State v. Bancroft, 148 Wis. (1912) 124, 134 N. W. 330; Cincinnati v. Louisville, &c. R. Co., 88 Ohio St. (1913) 283, 102 N. E. 951; St. Germain Irrig. Co. v. Hawthorn Ditch Co., 32 S. Dak. (1913) 260, 313, 143 N. W. 124; Taylor v. Drainage Dist. No. 56, 167 Iowa (1914) 42, 148 N. W. 1040, L. R. A. 1916B, 1193; State v. Superior Court of Cowlitz County, 77 Wash. (1914) 585, 137 Pac. 994; Neitzel v. Spokane Internat. R. Co., 80 Wash. (1914) 30, 141 Pac. 186; State v. Superior Court for Chehalis County, 82 Wash. (1914) 503, 144 Pac. 722; Chicago v. Gage, 268 Ill. (1915) 232, 109 N. E. 28; Emery v. Chicago, M. &c. R. Co., 35 S. Dak. (1915) 583, 153 N. W. 655; Oler v. Pittsburgh, C. &c. R. Co., 184 Ind. (1916) 431, 111 N. E. 619; Flood Abatement Commn. v. Merritt, 94 Misc. (1916) 388, 158 N. Y. S. 289; People v. Fisher, 98 Misc. (1917) 131, 164 N. Y. S. 125; Marin Mun. Water Dist. v. Marin Water & Power Co., 178 Cal. (1918) 308, 173 Pac. 469; Brickell v. Trammell, 77 Fla. (1919) 544, 82 So. 221; Rochester v. Holden, 224 N. Y. (1919) 386, 121 N. E. 102; Munn v. Independent School Dist., 188 Iowa (1920) 757, 176 N. W. 811; Rockingham County L. & P. Co. v. Philbrick, 79 N. H. (1920) 279, 108 Atl. 813; Connecticut L. & P. Co. v. Southbury, 95 Conn. (1921) 88, 111 Atl. 360; Pacific Gas & E. Co. v. Devlin, 188 Cal. (1922) 33, 203 Pac. 1058; Marblehead Land Co. v. Superior Court, 62 Cal. App. (1923) 408, 217 Pac. 536; Baltimore v. Dobler, 140 Md. (1923) 634, 118 Atl. 168; Smith v. Cameron, 106 Ore. (1923) 1, 210 Pac. 716; Cochran v. Cavanaugh, 252 S. W. (Tex. Civ. App., 1923) 284; Dallas Cotton Mills v. Industrial Co., 252 S. W. (Tex. Civ. App., 1923) 821; Jacobsen v. Superior Court, 192 Cal. (1924) 319, 219 Pac. 986; American Falls Reservoir Dist. v. Thrall, 39 Idaho (1924) 105, 228 Pac. 236; Houston v. West Greenville, 126 S. Car. (1924) 484, 120 S. E. 236; Benton v. Yarborough, 128 S. Car. (1924) 481, 123 S. E. 204; State ex rel. v. Superior Court, 127 Wash. (1924) 30, 219 Pac. 857; State v. Harper, 182 Wis. (1924) 148, 196 N. W. 451. *Contra:* Wilson v. Baltimore & P. R. Co., 5 Del. Ch. (1884) 524; Los Angeles v. Allen, 32 Cal. App. (1917) 553, 163 Pa. 697.

[68] Justice Miller noted this in the case of Davidson v. New Orleans, 96 U. S. (1878) 97 at 105, 24 L. ed. 616. "If private property be taken for

the deliberate intention of the framers of the Fourteenth Amendment not to restrict the power of the states in regard to eminent domain. But the justices looked beyond this superficial criterion of the meaning of due process to its essential significance and found that they could not conceive of a violation of the eminent domain provision which would not at the same time be a denial of due process of law. It can hardly be doubted that the court will use the same method in construing the equality provision. If anything a stronger case can be made for its inclusion under the concept of due process than for that of eminent domain. The fact that it was added to the general clause after due process had been a part of the constitution for three-quarters of a century would indicate, not that the framers of the amendment, intended to restrict the operation of the Fifth Amendment, but merely desired added caution in the Fourteenth. Under these circumstances, it is hard to see how the court can logically include the eminent domain provision under due process of law and at the same time exclude the equality concept.

It is evident that this question is still an enigma, and it is possible that it will continue to remain one for some time in the future. The conflicting *dicta* on the question, the hesitancy of the Supreme Court to take a decided stand on it, and the inherent difficulty of a satisfactory construction of this portion of the Fourteenth Amendment, all add to the confusion which surrounds it. As has been shown, in spite of very weighty reasons to the contrary, there seems to be a tendency of the courts to consider the two clauses as separate guarantees. If this tendency persists, it may be found that much of the potential power of due process as a limitation upon congressional action will be impaired. We may discover that the Fourteenth Amendment extended the scope of the powers of Congress much

public uses without just compensation, it must be remembered that, when the Fourteenth Amendment was adopted, the provision on that subject in immediate juxtaposition in the Fifth Amendment with the one we are construing, was left out, and this was taken."

further than had been anticipated, and Charles Sumner, in being so insistent upon the incorporation of the equality provision in it, not only pushed the enactment of a Bill of Rights for the states, but fostered a movement which may centralize the government much more than he thought.

PART SEVEN.

THE POLICE POWER.

CHAPTER XVII.

DUE PROCESS AS A POLICE POWER LIMITATION.

§ 113. The power of police is probably as old as government itself,[1] but as a separate classification of a distinct group of the powers of the state, it probably originated in the seventeenth century with the concept of sovereignty, to which it is so clearly related. Blackstone spoke of "public police and economy" as one of the attributes of sovereignty and under this heading discussed many regulations now well recognized as exertions of the police power.[2] The idea has a firm basis in the English common law, being closely associated with such ancient maxims as, *"Sic utere tuo ut alienum non laedas,"*[3] and *"Salus*

[1] From one point of view the "taboo" of primitive society is a form of the exercise of this power. Edward Jenks, The State and the Nation (N. Y., 1919), p. 31. It also has many points in common with Plato's conception of justice. The Republic, Book IV, p. 443.

[2] He defines "public police and economy" as "the due regulation and domestic order of the kingdom, whereby the individuals of the state, like the members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious and inoffensive in their respective stations." Commentaries on the Laws of England, Vol. IV, p. 162.

[3] "So use your property as not to injure the property of others." Morley v. Pragnel, 13 Croke (K. B., 1638) 510; Coke, Institutes of the Laws of England, Vol. IX, p. 59; H. Broom, Legal Maxims (6th ed.), p. 365. There are similar statements to be found in the Institutes of Justinian. W. R. Bierly, Police Power, State and Federal (Phila., 1907), p. 10, n. 5a.

populi suprema lex,"[4] from which it derived its original legal authority. The concept was not unknown in the American colonies, and there were references to it in the Constitutional Convention of 1787, in the Federalist and in many of the earlier American law treatises.[5] Many of these may be traced to Montesquieu's Spirit of the Laws.[6] It is also very closely related to the "domestic Tranquility" of the Preamble to the Constitution.[7]

Like many other important phrases of American constitutional law, the term "police power" was first used by Chief Justice Marshall. In a number of important decisions during the first quarter of the nineteenth century he spoke of the "power of a state to regulate its police,"[8] but the first time in which the single phrase "police power" was used seems to have been in his opinion in Brown v. Maryland, 1827.[9] In this case he only employed it in an off-

[4] "Public welfare is the highest law." Broom, Maxims, p. 1.

[5] W. G. Hastings, The Development of Law as Illustrated by the Decisions relating to the Police Power of the State, Proceedings of the American Philosophical Society, Vol. XXXIX (Sept., 1900), pp. 359-554 at pp. 365-367.

Thomas Paine spoke of it as follows: "The necessity of always fitting our internal police to the circumstances of the times we live in, is something so strikingly obvious, that no sufficient objection can be made against it. The safety of all societies depends upon it; and where this point is not attended to, the consequences will either be a general languor or a tumult. The encouragement and protection of the good subjects of any state, and the suppression and punishment of bad ones, are the line in which it ought to operate." The American Crisis, No. 3, M. C. Conway, Writings of Thomas Paine (N. Y., 1894), Vol. I, pp. 224, 225.

Note also the proposed addition to the Fifth Article of the Constitution. "No States shall without its consent be affected in its internal police." Farrand, Records of the Federal Convention, Vol. II, pp. 629, 630.

[6] De l'Esprit des Lois (1747), Book XX, ch. 14; Book XXVI, ch. 11, 24, For an account of similar concepts on the continent of Europe see T. D. Woolsey, "Nature and Sphere of the Police Power," Journal of Social Science, Vol. III (1870) p. 97.

[7] A. N. Holcombe, Foundation of the Modern Commonwealth (N. Y., 1923), pp. 330-334.

[8] "The acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject to a considerable extent." Gibbons v. Ogden, 9 Wheat. (U. S., 1924) 1 at 208, 6 L. ed. 23. See also Dartmouth College v. Woodward, 4 Wheat. (U. S., 1819) 518, 4 L. ed. 629.

[9] "The power to direct the removal of gun powder is a branch of the police power which unquestionably remains and ought to remain with the states." 12 Wheat. (U. S., 1827) 419 at 443, 6 L. ed. 678. Charles Warren,

hand way, and it did not come into general legal use until nearly a quarter of a century later [10] At that time it became politically important in the efforts of the states to resist the encroachments of federal power under the commerce clause.[11] It was not, indeed, until after the full discussion of this power in the License Cases,[12] that the term was taken up by the state courts.[13] The term was not listed in the standard American law dictionary (Bouvier's) until 1883, although this work had gone through thirteen earlier editions.[14]

§ 114. The earliest definition of the police power practically identified it with the powers of sovereignty.[15] In

History of the American Bar (Boston, 1911), p. 308. On the power to regulate the sale of explosives see Williams v. Walsh, 222 U. S. (1912) 415, 56 L. ed. 253.

[10] It is not to be found in such an important decision as that of Charles River Bridge v. The Warren Bridge, 11 Pet. (U. S., 1837) 420, 9 L. ed. 773. On the general topic see J. M. Blayney, "The Term 'Police Power,'" Central Law Journal, Vol. 59 (Dec. 16, 1904), p. 486.

[11] This came as the result of the decision in New York v. Miln, 7 Pet. (U. S., 1837) 102, in which the conflict between the state police power and the federal commerce power was first clearly brought out. Hastings, Development of Law, pp. 270-273.

[12] 5 How. (U. S., 1847) 504, 12 L. ed. 256. See especially the discussion of Chief Justice Taney at pp. 579-583.

[13] The first case in the state courts to speak of the "police power" seems to have been Commonwealth v. Alger, 7 Cush. (Mass., 1851) 53 at 85. It was also mentioned the year following by the Illinois Court in Jones v. People, 14 Ill. (1852) 196, per Justice Trumbull, Hastings, Development of Law, p. 414.

By 1855 it was said by the Missouri court that this power was "known familiarly as the police power." State v. Searcy, 20 Mo. (1855) 489 at 490. The term was used infrequently in the cases of this period, however. See People v. Jackson & M. Plank Rd. Co., 9 Mich. (1861) 285 at 309; Indianapolis &c. R. Co. v. Kercheval, 16 Ind. (1861) 84, for other instances of uses of the phrase.

[14] Hastings, Development of Law, p. 359. There seems to have been a reference to it in the Ohio Constitution of 1851. "The Commissioners of counties, the trustees of townships, and similar boards, shall have such power of local taxation for police purposes as may be prescribed by law." Article X, sec. 7. Sessions v. Crunkilton, 20 Ohio St. (1870) 349 at 358; Champaign County Commrs. v. Church, 62 Ohio St. (1900) 318 at 346, 57 N. E. 50, 48 L. R. A. 738, 78 Am. St. 718. See also Vermont Const. 1777, ch. I, art. IV; State v. Conlin, 27 Vt. (1855) 318 at 321.

[15] "What are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. That is to say, . . . the power to govern men and things within the limits of its dominion." Chief Justice Taney, License Cases, 5 How. (U. S., 1847) 509 at 583, 12 L. ed. 291.

1851 Chief Justice Shaw gave the often quoted definition of it as "the power vested in the legislature by the con-

This definition has also been very widely followed: Prigg v. Pennsylvania, 16 Pet. (U. S., 1842) 539 at 625, 10 L. ed. 1060; Munn v. Illinois, 94 U. S. (1876) 113, 24 L. ed. 77; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. (1899) 684, 43 L. ed. 858; Chicago, B. & Q. R. Co. v. Illinois ex rel., 200 U. S. (1906) 561, 50 L. ed. 596; In re Arkansas Rate Cases, 187 Fed. (1911) 290 at 292, 297; Lake View v. Rose Hill Cemetery Co., 70 Ill. (1873) 191, 22 Am. Rep. 71; People v. Rosenburg, 67 Hun (1893) 52, 22 N. Y. S. 56 at 58; Meadowcroft v. People, 163 Ill. (1896) 56, 45 N. E. 991; Booth v. People, 186 Ill. (1900) 43, 57 N. E. 798; Price v. People, 193 Ill. (1901) 114 at 117, 61 N. E. 844; Mathews v. Kalamazoo Bd. of Educa., 127 Mich. (1901) 530, 86 N. W. 1036; McKeon v. New York, N. H. & H. R. Co., 75 Conn. (1902) 343, 53 Atl. 656; Carpenter v. Reliance Realty Co., 103 Mo. App. (1903) 480, 77 S. W. 1004; Spiegler v. Chicago, 216 Ill. (1905) 114, 74 N. E. 718; People v. Steele, 231 Ill. (1907) 340, 83 N. E. 236; Chicago v. Powers, 231 Ill. (1907) 560, 83 N. E. 240; State v. Redmon, 134 Wis. (1907) 89, 114 N. W. 137; Williams v. State, 85 Ark. (1908) 464, 108 S. W. 838; Cochran v. Preston, 108 Md. (1908) 220, 70 Atl. 113; In re Jonqua, 10 Cal. App. (1909) 602, 103 Pac. 159; Appeal of Allyn, 81 Conn. (1909) 534, 71 Atl. 794; Massie v. Cessna, 239 Ill. (1909) 352, 88 N. E. 152; Inland Steel Co. v. Yedinak, 172 Ind. (1909) 423, 87 N. E. 229; Mutual Loan Co. v. Martell, 200 Mass. (1909) 482, 86 N. E. 916; McCord v. State, 2 Okla. Cr. (1909) 214, 101 Pac. 280; State v. Central Lumber Co., 24 S. Dak. (1909) 136, 123 N. W. 504; State v. Sherman, 18 Wyo. (1909) 169, 105 Pac. 299; Atlantic Coast Line R. Co. v. Coachman, 59 Fla. (1910) 130, 52 So. 377; Ritchie & Co. v. Wayman, 244 Ill. (1910) 509, 91 N. E. 695; People v. Bowes-Allegretti Co., 244 Ill. (1910) 557, 91 N. E. 701; Chicago v. Weber, 246 Ill. (1910) 304, 92 N. E. 859; State v. Louisville &c. R. Co., 97 Miss. (1910) 35, 51 So. 918, 53 So. 454; Oldknow v. Atlanta, 9 Ga. App. (1911) 594, 71 S. E. 1015; Shelby v. Cleveland Mill & Power Co., 155 N. Car. (1911) 196, 71 S. E. 218; Commonwealth v. Plymouth Coal Co., 232 Pa. (1911) 141, 81 Atl. 148; State v. Kofines, 33 R. I. (1911) 211, 80 Atl. 432; Hernandez v. State, 135 S. W. (Tex. Civ. App., 1911) 170; State ex rel. v. Clausen, 65 Wash. (1911) 156, 117 Pac. 1101; People v. Elerding, 254 Ill. (1912) 579, 98 N. E. 982; In re Opinion of the Justices, 211 Mass. (1912) 605, 98 N. E. 334; Motlow v. State, 125 Tenn. (1912) 547, 145 S. W. 177; Sabre v. Rutland R. Co., 86 Vt. (1913) 347, 85 Atl. 693; State v. Grier, 4 Boyce (Del., 1914) 322, 88 Atl. 579; Van Winkle v. State, 4 Boyce (Del., 1914) 578, 91 Atl. 385; State v. United States Exp. Co., 164 Iowa (1914) 112, 145 N. W. 451; Union Ice & Coal Co. v. Ruston, 135 La. (1914) 898, 66 So. 262; Commonwealth v. Libbey, 216 Mass. (1914) 356, 103 N. E. 923; Union Pac. R. Co. v. Lincoln, 97 Nebr. (1914) 198, 149 N. W. 419; Stettler v. O'Hara, 69 Ore. (1914) 519, 139 Pac. 743; State v. Bunting, 71 Ore. (1914) 259, 139 Pac. 731; State v. Pitney, 79 Wash. (1914) 608, 140 Pac. 918; Sanitary District v. Chicago &c. R. Co., 267 Ill. (1915) 252, 108 N. E. 312; People v. Weiner, 271 Ill. (1915) 74, 110 N. E. 870; Welch v. Coglan, 126 Md. (1915) 1, 94 Atl. 384; Buffalo Branch Mut. Film Corp. v. Breitinger, 250 Pa. (1915) 225, 95 Atl. 433; Skinner v. Thomas, 171 N. Car. (1916) 98, 87 S. E. 976; State ex rel. v. Taylor, 33 N. Dak. (1916) 76, 156 N. W. 561; Ex parte Cencinino, 31 Cal. App. (1917) 238, 160 Pac. 167; People v. Johnson, 288 Ill. (1919) 442, 123 N. E. 543; People v. Blanchard, 105 Misc. 401, 174 N. Y. S. (1919) 276; Connecticut Co. v. Stamford, 95 Conn.

stitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same."[16] Both Cooley and Freund have adopted similarly broad definitions.[17] The tendency of the courts now, however, is to narrow the concept to "the power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals and general welfare of society."[18] The fact is that the limits of

(1920) 26, 110 Atl. 554; Clements v. McCabe, 210 Mich. (1920) 207, 177 N. W. 722; Hanzal v. San Antonio, 221 S. W. (Tex. Civ. App., 1920) 237; In re Guerra, 94 Vt. (1920) 1, 110 Atl. 224; State v. Coleman, 96 Conn. (1921) 190, 113 Atl. 385; Cincinnati v. Harth, 101 Ohio St. (1921) 344, 128 N. E. 263; Chicago, R. I. &c. R. Co. v. Taylor, 79 Okla. (1921) 142, 192 Pac. 349; Union Fishermen's Co. v. Shoemaker, 98 Ore. (1921) 659, 193 Pac. 476, 194 Pac. 854; State v. Tibbetts, 205 Pac. (Okla. Cr., 1922) 776; Ex parte Sales, 108 Okla. (1924) 29, 233 Pac. 186; State ex rel. v. Riedell, 109 Okla. (1924) 35, 233 Pac. 684; Ex parte Tindall, 102 Okla. (1925) 192, 229 Pac. 125.

[16] Commonwealth v. Alger, 7 Cush. (Mass., 1851) 53 at 85. The case involved the validity of an ordinance establishing a harbor-line beyond which piers could not be built. This case is discussed in sec. 117. "No exposition has been given of this power more thorough and satisfactory, or more often quoted with approval, than that of Chief Justice Shaw." Commonwealth v. Bearse, 132 Mass. (1882) 542 at 546, 42 Am. Rep. 450. See also New York City v. Ryan, 2 E. D. Smith (N. Y., 1854) 368; Owners of Brig. James Gray v. The Ship John Fraser, 21 How. (U. S., 1858) 187, 16 L. ed. 106; Roosevelt v. Godard, 52 Barb. (N. Y., 1868) 533 (such regulations do not violate due process); Tinken v. Stillwagon, 1 City Ct. (N. Y., 1878) 390; Green v. Steamer Helen, 1 Fed. (1880) 916; Board of Harbor Commrs. v. Excelsior Redwood Co., 88 Cal. (1891) 491, 26 Pac. 375, 22 Am. Rep. 321.

Most regulations of harbors are challenged under the commerce clause rather than under due process. If they are of a purely police nature they are generally upheld. Cincinnati Pack. Co. v. Catlesburg, 105 U. S. (1881) 563, 26 L. ed. 1170 (wharf regulation); People v. Jenkins, 1 Hill (N. Y., 1841) 469 (regulation of speed of steamboats); Fitch v. Livingston, 6 N. Y. Sup. Ct. (1851) 492 (requiring lights on vessels); New York v. Furgueson, 23 Hun (N. Y., 1881) 594 (sanitary regulations for vessels); Harmon v. Chicago, 110 Ill. (1884) 400, 51 Am. Rep. 698 (regulating smoke from vessels).

[17] T. M. Cooley, Treatise on Constitutional Limitations (6th ed.), p. 572; Ernst Freund, The Police Power (Chicago, 1904), p. iii. The latter defines it as "the power of promoting the public welfare by restraining and regulating the use of liberty and property."

[18] Corpus Juris, Vol. XII, p. 904. The tendency to limit the police power is especially noticeable in: United States v. Cohen, 268 Fed. (1921) 420; Lake View v. Rose Hill Cemetery Co., 70 Ill. (1873) 191 at 197, 22

this power are not at all clear and even though we have developed such concepts as due process, validity of legis-

Am. Rep. 71; Frorer v. People, 141 Ill. (1892) 171, 31 N. E. 395; Health Dept. v. Rector of Trinity Church, 17 N. Y. S. (1892) 510, 513; Champer v. Greencastle, 138 Ind. (1894) 339 at 351, 35 N. E. 14; Ritchie v. People, 155 Ill. (1895) 98, 40 N. E. 454; Booth v. People, 186 Ill. (1900) 43, 57 N. E. 798; People v. Steele, 231 Ill. (1907) 340, 83 N. E. 236; Belleville v. St. Clair County Tpk. Co., 234 Ill. (1908) 428 at 437, 84 N. E. 1049; Mehlos v. Milwaukee, 156 Wis. (1914) 591 at 597; Chicago Sanitary Dist. v. Chicago &c. R. Co., 267 Ill. (1915) 252 at 256, 108 N. E. 312; People v. Weiner, 271 Ill. (1915) 74 at 78, 110 N. E. 870; Binford v. Boyd, 178 Cal. (1918) 458, 174 Pac. 56; Leonard, Jr. v. State, 100 Ohio St. (1919) 456, 127 N. E. 464; Cincinnati v. Harth, 101 Ohio St. (1920) 344, 128 N. E. 263; Ex parte Hudgins, 86 W. Va. (1920) 526, 103 S. E. 327; Rumbo v. Winterrowd, 228 S. W. (Tex. Civ. App., 1921) 258; Conger v. Pierce County, 116 Wash. (1921) 27, 198 Pac. 377 at 380; Hoblitzel v. Jenkins, 204 Ky. (1925) 122, 263 S. W. 764; Taylor v. Smith, 124 S. E. (Va., 1925) 259.

Other cases giving a similar definition of the police power are: Webber v. Virginia, 103 U. S. (1880) 334 at 348, 26 L. ed. 565; Barbier v. Connolly, 113 U. S. (1885) 27 at 31, 28 L. ed. 923; New Orleans Gas Light Co. v. Louisiana L. & H. Co., 115 U. S. (1885) 650, 29 L. ed. 516; Terrace v. Thompson, 263 U. S. (1924) 197, 68 L. ed. 255; Rochester v. West, 29 App. Div. (1898) 125 at 128, 51 N. Y. S. 482; Ex parte Boyce, 27 Nev. (1904) 299 at 332, 75 Pac. 1; Morrison v. State, 116 Tenn. (1905) 534, 95 S. W. 494; Inland Steel Co. v. Yedinak, 172 Ind. (1909) 423 at 433, 87 N. E. 229; Ritchie v. Wayman, 244 Ill. (1910) 509, 91 N. E. 695; People v. Bowes-Allegretti Co., 244 Ill. (1910) 557, 91 N. E. 701; State v. Penny, 42 Mont. (1910) 118 at 125, 111 Pac. 727; State v. Mamlock, 58 Wash. (1910) 631 at 633, 109 Pac. 47; Oldknow v. Atlanta, 9 Ga. App. (1911) 594 at 595, 71 S. E. 1015; Ex parte Townsend, 64 Tex. Cr. (1911) 350, 144 S. W. 628; State Board of Health v. Greenville, 86 Ohio St. (1912) 1, 98 N. E. 1019; Chicago T. H. &c. R. Co. v. Anderson, 182 Ind. (1914) 140 at 143, 105 N. E. 49; People v. Brazee, 183 Mich. (1914) 259, 149 N. W. 1053; Jensen v. Southern Pac. Co., 215 N. Y. (1915) 514, 109 N. E. 600; Churchill v. Rafferty, 32 P. I. (1915) 580 at 604; State v. Jacobson, 80 Ore. (1916) 648, 157 Pac. 1108; Condon v. Forest Park, 278 Ill. (1917) 218, 115 N. E. 825; People v. Byrne, 99 Misc. (1917) 1, 163 N. Y. S. 682; State v. Perley, 173 N. Car. (1917) 783, 92 S. E. 504; People v. Griffith, 280 Ill. (1918) 18, 117 N. E. 195; Commonwealth v. Wormser, 67 Pa. Super. Ct. (1918) 444; Ex parte White, 82 Tex. Cr. (1918) 85, 198 S. W. 583; Frost v. Los Angeles, 181 Cal. (1919) 22, 183 Pac. 342; Catholic Bishop v. Palos Park, 286 Ill. (1919) 400, 121 N. E. 561; Schiller Piano Co. v. Illinois N. U. Co., 288 Ill. (1919) 580, 123 N. E. 631; Grand Trunk W. R. Co. v. Industrial Commn., 291 Ill. (1919) 167, 125 N. E. 748; Nolan v. Jones, 263 Pa. (1919) 124, 106 Atl. 235; Jackman v. Rosenbaum Co., 263 Pa. (1919) 158, 106 Atl. 238; Rubi v. Provincial Board, 39 P. I. (1919) 660; State ex rel. v. Wisconsin Telephone Co., 169 Wis. (1919) 198, 172 N. W. 225; Chicago, R. I. &c. R. Co. v. Taylor, 79 Okla. (1920) 142, 192 Pac. 349; O'Neil v. Providence A. Co., 42 R. I. (1920) 479, 108 Atl. 887; Parrott v. Benson, 114 Wash. (1921) 117, 194 Pac. 986; Spann v. Dallas, 111 Tex. (1922) 350, 235 S. W. 513; State v. Emery, 189 Wis. (1922) 564; Ex parte Co., 106 Ohio St. (1923) 50, 139 N. E. 204; Williams v. State, 130 Miss. (1923) 827, 94 So. 882 at 883; Goldman v. Crowther, 128 Atl. (Md., 1924) 50; Stone v. Kendall, 268 S. W. (Tex. Civ. App., 1924) 759.

lative object, equal protection of the laws, etc., in an effort to sharpen the definition, the real limits of this important power still lie somewhere in a twilight zone.[19]

§ 115. During the first half of the nineteenth century, even the first of these limiting concepts [due process of law] was not associated with the bounds of the state's police power. Scarcely had the idea of this power developed, however, before it became evident to the more advanced courts that it was not unlimited. But it was not until questions of procedure involving due process of law began to come up in connection with police power cases, that it occurred to the judges to invoke it as a limitation.

This is clearly shown in the development of the cases during this period. The constitutionality of this power was attacked in two cases before the New York Courts as early as 1827. Both of these cases were felt to have considerable importance at the time. The first involved the constitutionality of a law empowering harbor-masters in New York City to regulate the shipping of New York harbor and providing that violators of these regulations should be fined. This statute was upheld as a necessary police measure but neither the arguments of counsel nor the opinion of the court mentioned due process of law.[20] Shortly afterward the same court upheld police regulations

[19] Within the past few years there has developed a reaction to the limits which have been placed on the power and a number of courts seem to be facing in the other direction. Carr v. State, 175 Ind. (1910) 241 at 261, 93 N. E. 1071; State v. Superior Court of King County, 67 Wash. (1910) 355 at 400, 121 Pac. 847; State v. Mountain Timber Co., 75 Wash. (1913) 581 at 584, 135 Pac. 645; Stettler v. O'Hara, 69 Ore. (1914) 519, 139 Pac. 743; Strawberry Hill L. Co. v. Starbuck, 124 Va. (1918) 71, 97 S. E. 362; State Public Utils. Commn. v. Quincy, 290 Ill. (1919) 360, 125 N. E. 374; State v. Seney Co., 134 Md. (1919) 437, 107 Atl. 189; Clements v. McCabe, 210 Mich. (1920) 207, 177 N. W. 722; Des Moines v. Manhattan Oil Co., 193 Iowa (1921) 1096, 184 N. W. 823; Ullmann Realty Co. v. Tamur, 113 Misc. (1921) 538, 185 N. Y. S. 612; State v. Laundy, 103 Ore. (1922) 443, 204 Pac. 958; Camas Stage Co. v. Kozer, 104 Ore. (1922) 600, 209 Pac. 95 at 98; State ex rel. v. Harper, 182 Wis. (1923) 148, 196 N. W. 451; People v. Witte, 315 Ill. (1924) 282, 146 N. E. 178; Reaves Warehouse Corp. v. Commonwealth, 141 Va. (1924) 194, 126 S. E. 87; Liberty Warehouse Co. v. Burley Tobacco Growers Assn., 271 S. W. (Ky., 1925) 695.

[20] Vanderbilt v. Adams, 7 Cow. (N. Y., 1827) 349.

making burial impossible in certain cemeteries, but again there was no mention of this guarantee.[21] In Massachusetts a still more important case arose. A city ordinance ordered the filling in of a creek in which the complainant claimed he had a vested right of navigation. His plea was rejected and the ordinance upheld, but here again there was no mention of due process.[22] Even where the question of due process was raised, as in an Alabama case, it was discussed only in relation to the classification in the ordinance and not as a limitation on the general exercise of the police power.[23]

21 Stuyvesent v. New York, 7 Cow. (N. Y., 1827) 588. The court relied considerably upon the great public necessity of the regulations. The power to regulate cemeteries is now firmly established. Laurel Hill Cemetery v. San Francisco, 216 U. S. (1910) 258, 54 L. ed. 515. See also on the question of the extent of this power: Carpenter v. Yeadon, 158 Fed. (1908) 766; Coates v. New York City, 7 Cow. (N. Y., 1827) 585; City Council of Charleston v. Baptist Church, 4 Stob. (S. Car., 1850) 306; Lake View v. Letz, 44 Ill. (1867) 81; In re Kincaid's Appeal, 66 Pa. (1870) 411, 5 Am. Rep. 377; Sohier v. Trinity Church, 109 Mass. (1871) 1; Woodlawn Cemetery v. Everett, 118 Mass. (1875) 354; Stockton v. Newark, 42 N. J. Eq. (1887) 531, 9 Atl. 203; Humphrey v. Board of Trustees, 109 N. Car. (1891) 132, 13 S. E. 793; Scovill v. McMahon, 62 Conn. (1892) 378, 26 Atl. 479; Austin v. Austin City Cemetery Assn., 87 Tex. (1894) 330, 28 S. W. 528; Ex parte Bohen, 115 Cal. (1896) 372, 47 Pac. 55; Pfleger v. Groth, 103 Wis. (1899) 104, 79 N. W. 19; Commonwealth v. Charity Hospital, 198 Pa. (1901) 270, 47 Atl. 980; Palmer v. Hickory Grove Cemetery, 82 N. Y. S. (1903) 973; Bryan v. Birmingham, 154 Ala. (1908) 447, 45 So. 922; Iuszkewicz v. Luther, 30 R. I. (1910) 570, 76 Atl. 829; Union Cemetery Assn. v. Kansas City, 252 Mo. (1913) 466, 161 S. W. 261; Abbey Land & Imp. Co. v. San Mateo County, 167 Cal. (1914) 434, 139 Pac. 1068; New York City v. Kelsey, 213 N. Y. (1914) 638, 107 N. E. 1074; Augusta v. Bredenberg, 146 Ga. (1917) 459, 91 S. E. 486; Brown v. Park Cemetery, 78 N. H. (1917) 387, 101 Atl. 34; Catholic Bishop v. Palos Park, 286 Ill. (1919) 400, 121 N. E. 561; German Evangelical Cong. v. Schreiber, 277 Mo. (1919) 113, 209 S. W. 914; Fraser v. Lee, 8 Ohio App. (1919) 235; Ex parte Adlof, 86 Tex. Cr. (1920) 13, 215 S. W. 222; Park Hill Dev. Co. v. Evansville, 190 Ind. (1921) 432, 130 N. E. 645; Mansker v. Astoria, 100 Ore. (1921) 435, 198 Pac. 199, 199 Pac. 381; Johnson v. Ocean View Cemetery, 198 App. Div. (1922) 854, 191 N. Y. S. 128; Farb v. Theis, 250 S. W. (Tex. Civ. App., 1923) 290; Villa Park v. Wanderer's Rest Cemetery Co., 316 Ill. (1925) 226, 147 N. E. 104.

22 Baker v. Boston, 12 Pick. (Mass., 1831) 184, 22 Am. Dec. 421. The facts showed that the use of the creek as a sewerage drain had made it a nuisance and that the only navigation on it was by means of rafts. Justice Wilde pointed out that the owner would benefit by this improvement, together with the rest of society, and that in any case this was an operation of the fundamental power of the state.

23 Mayor of Mobile v. Yuille, 3 Ala. (1841) 137, 36 Am. Dec. 441. An ordinance providing for the licensing of bakeries was upheld, no question

Not only was there no effort to limit the police power by due process in its exercise through local ordinances, but this was also true with regard to the state laws of this period. In 1838 a New York law, providing that when liquor was sold in groceries, it should not be drunk on the premises, was upheld, but there was no mention of due process as a distinct limitation upon the sovereign power of the state in this regard. It is significant, however, that in this case the court uses language which indicates that the germ of modern limitations on the police power was present.[24] In subsequent cases liquor laws were sometimes held void,[25] and sometimes upheld,[26] the latter by the Federal Supreme Court.[27] But in none of these cases was there any mention of due process of law. During the same period the South Carolina court upheld a law forcing slave owners to feed and clothe their slaves;[28] the New Jersey court upheld an act authorizing the destruction of buildings in the path of a fire;[29] and a federal court sustained a state law prohibiting certain types of

regarding the power of license was raised in connection with due process. Similar bakery licenses have been upheld in: Wonner v. Carterville, 142 Mo. App. (1910) 120, 125 S. W. 861; Chicago v. Drogasawacz, 256 Ill. (1912) 34, 99 N. E. 869. On the general question of regulations of bakeries see: Munn v. Illinois, 94 U. S. (1876) 113 at 129, 24 L. ed. 77; Lochner v. New York, 198 U. S. (1905) 52, 49 L. ed. 939; Guillotte v. New Orleans, 12 La. Ann. (1857) 432; Commonwealth v. McArthur, 152 Mass. (1890) 522, 25 N. E. 836; People v. Wagner, 86 Mich. (1891) 594, 49 N. W. 609; Chicago v. Schmidinger, 243 Ill. (1909) 167, 90 N. E. 369; Schmidinger v. Chicago, 226 U. S. (1913) 578, 57 L. ed. 364; State v. Miksicek, 225 Mo. (1910) 561, 125 S. W. 507; Jones v. Huxtable, L. R. 2 Q. B. Cas. (1867) 460; In re Nasmith, 2 Ont. (1883) 192.

[24] The court distinguished between legitimate and illegitimate occupations and pointed out that no one had a vested right to sell liquor and the city had the right to grant licenses. People v. Morris, 13 Wend. (N. Y., 1835) 325.

[25] Parker v. Commonwealth, 6 Pa. (1847) 507, 47 Am. Dec. 480; Rice v. Foster, 4 Harr. (Del., 1847) 479; In re Opinion of the Justices, 25 N. H. (1852) 537.

[26] Pierce v. State, 13 N. H. (1843) 536; Commonwealth v. Kendall, 12 Cush. (Mass., 1856) 414; People v. Hawley, 3 Mich. (1854) 330; People v. Gallagher, 4 Mich. (1856) 244.

[27] License Cases, 5 How. (U. S., 1847) 504, 12 L. ed. 256.

[28] State v. Bowen, 3 Strob. (S. Car., 1849) 573.

[29] American Print Works v. Lawrence, 23 N. J. L. (1851) 590, 57 Am. Dec. 420. For other cases dealing with the summary destruction of property see sec. 90, n. 43 and sec. 128, n. 43.

fisheries.[30] But in no case was there any discussion of the law of the land in connection with the statute. These cases show the tendency of the courts and it was reflected in the many other cases of this period involving the police power.[31] Even in some of the more advanced jurisdictions, due process was not recognized by either court or counsel as a limitation upon the recently enunciated police power which was so rapidly to come into favor.

§ 116. Even before the police power was recognized by that name, there arose a number of cases involving "regulations of police" in which due process of law was mentioned. The earliest of these was in the New Hampshire Sunday law case where it was argued that, because the law gave summary powers of enforcement to local magistrates, it was void. The argument containing the allusion to the "law of the land" centered entirely around the procedural aspects of the case, and there was no suggestion that that guarantee might be a limitation upon the power itself. As we have seen,[32] the argument that

[30] Bennett v. Boggs, 3 Fed. Cas. (1830) p. 221, 227, No. 1319. Justice Baldwin in this case declared: "The remedy for unwise or oppressive legislation within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people." Other cases involving the right of the state to regulate fishing are: Lawton v. Steele, 152 U. S. (1894) 135, 38 L. ed. 388; Lee v. New Jersey, 207 U. S. (1907) 67, 52 L. ed. 106; In re Fish Seizure, 5 Ohio Dec. (1896) 553; Peters v. State, 96 Tenn. (1896) 682, 36 S. W. 399; Bittenhaus v. Johnston, 92 Wis. (1896) 588, 66 N. W. 805, 32 L. R. A. 380; State v. Schuman, 36 Ore. (1899) 16, 58 Pac. 661; State v. Leavitt, 105 Maine (1909) 76, 72 Atl. 875; State v. Kofines, 33 R. I. (1911) 211, 80 Atl. 432; People v. Booth Fisheries Co., 253 Ill. (1912) 423, 97 N. E. 837; Barker v. State Fish Commission, 88 Wash. (1915) 73, 152 Pac. 537; State v. Savage, 96 Ore. (1919) 53, 184 Pac. 567, 189 Pac. 427; People v. Walton, 145 N. E. (Ill., 1924) 182; Alsos v. Kendall, 111 Ore. (1924) 359, 227 Pac. 286; People v. Monterey Fish Products Co., 234 Pac. (Cal., 1925) 398; State ex rel. v. Maybury, 239 Pac. (Wash., 1925) 552; Lubetich v. Pollock, 6 Fed. (2d) (1925) 237; McMillan v. Sims, 132 Wash. (1925) 265, 231 Pac. 943; Stacks v. State, 20 Ala. App. (1925) 462, 103 So. 70. On the power of the state to regulate hunting see: New York ex rel. v. Hesterberg, 211 U. S. (1908) 31, 53 L. ed. 75; Patsone v. Pennsylvania, 232 U. S. (1914) 138, 58 L. ed. 539; Ex parte Kenneke, 136 Cal. (1902) 527, 528, 69 Pac. 261; State v. Mallory, 73 Ark. (1904) 236, 83 S. W. 955, 67 L. R. A. 773; People v. Sayer, 246 Ill. (1910) 382, 92 N. E. 900; State v. Hill, 98 Miss. (1910) 142, 53 So. 411. See also sec. 107, n. 24.

[31] See Hastings, Development of Law, pp. 411-414 where a number of other police power cases of this period are reviewed.

[32] See sec. 79.

a legislative act imposing summary procedure was not the law of the land, was rejected by the New Hampshire court.[33] Twenty years later the North Carolina court

[33] Mayo v. Wilson, 1 N. H. (1817) 53. Sunday laws are usually attacked as violations of religious liberty, but regardless of the argument presented they have been consistently sustained. Hennington v. Georgia, 163 U. S. (1896) 318, 41 L. ed. 174; Petit v. Minnesota, 177 U. S. (1900) 165, 44 L. ed. 718; Swann v. Swann, 21 Fed. (1884) 299; Brunswick-Balke-Collander Co. v. Evans, 228 Fed. (1916) 991; Commonwealth v. Caldwell, 14 Mass. (1817) 330; Specht v. Commonwealth, 8 Pa. (1848) 312; Shover v. State, 10 Ark. (1850) 259; Voglesong v. State, 9 Ind. (1857) 112; Commonwealth v. Nesbit, 34 Pa. (1859) 398; Ex parte Andrews, 18 Cal. (1861) 678; Lindenmuller v. People, 33 Barb. (N. Y., 1861) 548; Foltz v. State, 33 Ind. (1870) 215; Commonwealth v. Has, 122 Mass. (1877) 40; Bucher v. Fitchburg R. Co., 131 Mass. (1881) 156, 41 Am. Rep. 216; Ex parte Koser, 60 Cal. (1882) 177; Commonwealth v. Louisville &c. R. Co., 80 Ky. (1882) 291, 3 Ky. L. 788, 44 Am. Rep. 475; Dinsmore v. New York Board of Police, 12 Abb. N. Cas. (N. Y., 1882) 436, 445; Adams Exp. Co. v. Board of Police, 65 How. Pr. (N. Y., 1883) 72; State v. Baltimore &c. R. Co., 24 W. Va. (1884) 783, 787, 49 Am. Rep. 290; State ex rel. v. Judge, 39 La. Ann. (1887) 132, 136, 1 So. 437; State v. Fernandez, 39 La. Ann. (1887) 538, 2 So. 233; Ex parte Sundstrom, 25 Tex. App. (1888) 133, 8 S. W. 207; Gunn v. State, 89 Ga. (1892) 341, 15 S. E. 458; Judefind v. State, 78 Md. (1894) 510, 28 Atl. 405, 22 L. R. A. 721; People v. Bellet, 99 Mich. (1894) 151, 57 N. W. 1094; People ex rel. v. Sheriff of Kings County, 13 Misc. (1895) 587, 35 N. Y. S. 19; People v. Havnor, 149 N. Y. (1896) 195, 43 N. E. 541, 31 L. R. A. 689, 52 Am. St. 707; State v. Southern R. Co., 119 N. Car. (1896) 814, 25 S. E. 862; Norfolk R. Co. v. Commonwealth, 93 Va. (1896) 749, 24 S. E. 837; State v. Nesbit, 8 Kans. App. (1898) 104, 54 Pac. 326; State v. Powell, 58 Ohio St. (1898) 324, 50 N. E. 900, 41 L. R. A. 854; State v. Hogreiver, 152 Ind. (1899) 652, 658, 53 N. E. 921; Ex parte Kennedy, 42 Tex. Cr. (1900) 148, 58 S. W. 129, 51 L. R. A. 270; People ex rel. v. Hagan, 36 Misc. (1901) 349, 73 N. Y. S. 564; Ex parte Northrup, 41 Ore. (1902) 489, 69 Pac. 445; State v. Nichols, 28 Wash. (1902) 628, 69 Pac. 372; Harrison v. Wallis, 44 Misc. (1904) 492, 90 N. Y. S. 44; Lovillia v. Cobb, 126 Iowa (1905) 557, 102 N. W. 496; Walter v. State, 35 Ohio C. C. R. (1905) 567; Commonwealth v. Rothermel, 27 Pa. Super. Ct. (1905) 648; State v. Bergfeldt, 41 Wash. (1905) 234, 83 Pac. 177; McClelland v. Denver, 36 Colo. (1906) 489, 86 Pac. 126; State v. Weiss, 97 Minn. (1906) 125, 105 N. W. 1127; Bennett v. State, 49 Tex. Cr. (1906) 294, 92 S. W. 415; State v. Dolan, 13 Idaho (1907) 693, 92 Pac. 995; In re Jacobs, 13 Idaho (1907) 720, 92 Pac. 1003; State v. Campbell, 206 Mo. (1907) 579, 105 S. W. 637; Matter of Hammerstein, 57 Misc. (1907) 52, 108 N. Y. S. 197; State v. Herald, 47 Wash. (1907) 538, 92 Pac. 376; Barefield v. State, 85 Ark. (1908) 134, 107 S. W. 393; In re Caldwell, 82 Nebr. (1908) 544, 118 N. W. 133; Moore v. Owen, 58 Misc. (1908) 332, 109 N. Y. S. (1908) 585; Stanfeal v. State, 78 Ohio St. (1908) 24, 84 N. E. 419; New Castle v. Cummings, 36 Pa. Super. Ct. (1908) 443; In re Donnellan, 49 Wash. (1908) 460, 95 Pac. 1085; Silverberg Bros. v. Douglass, 62 Misc. (1909) 340, 114 N. Y. S. 824; State v. Penny, 42 Mont. (1910) 118, 111 Pac. 727; Ex parte Roquemore, 60 Tex. Cr. (1910) 282, 131 S. W. 1101; Carr v. State, 175 Ind. (1911) 241, 93 N. E. 1071; O'Brien v. Shea, 208 Mass. (1911) 528, 95 N. E. 99; New York City v. Alhambra

upheld an act giving justice courts summary powers over vagrants in spite of the objection that such powers violated due process of law. Here again there was no claim that this phrase limited the legislature in the exercise of powers of a police nature, but only that it prevented summary methods of conviction.[34] It is evident that due process was brought up in the first police power cases only because of the procedural aspects involved; and even then the courts refused to consider this protection as preventing the action complained of.

In some cases, however, the laws did not fare so well. An Alabama statute which required every lawyer, before being admitted to the bar, to take an oath that he had never taken part in or aided in a duel, was held void as

Theatre Co., 202 N. Y. (1911) 528, 95 N. E. 1125; People v. Dunford, 207 N. Y. (1912) 17, 100 N. E. 433; Clinton v. Wilson, 257 Ill. (1913) 580, 101 N. E. 192; State v. Smart, 22 Wyo. (1913) 154, 136 Pac. 452; Siddons v. Edmonston, 42 App. D. C. (1914) 459; Hiller v. State, 124 Md. (1914) 385, 92 Atl. 842; In re Ferguson, 80 Wash. (1914) 102, 141 Pac. 322; People v. C. Klinck Packing Co., 214 N. Y. (1915) 121, 108 N. E. 278; People ex rel. v. Lent, 215 N. Y. (1915) 626, 109 N. E. 1088; State v. Medlin, 170 N. Car. (1915) 682, 86 S. E. 597; State v. Nicholls, 77 Ore. (1915) 415, 151 Pac. 473; State v. Davis, 171 N. Car. (1916) 809, 89 S. E. 40; Rosenbaum v. State, 131 Ark. (1917) 251, 199 S. W. 388; State v. Linsig, 178 Iowa (1917) 484, 159 N. W. 995; Gray v. Commonwealth, 171 Ky. (1917) 269, 188 S. W. 354; Bogalusa v. Blanchard, 141 La. (1917) 33, 74 So. 588; People ex rel. v. Joyce, 174 App. Div. (1917) 574, 161 N. Y. S. 771; State v. Burbage, 172 N. Car. (1917) 876, 89 S. E. 795; In re Sumida, 177 Cal. (1918) 388, 170 Pac. 823; Capital Theater Co. v. Commonwealth, 178 Ky. (1918) 780, 199 S. W. 1076; State v. Murray, 104 Nebr. (1919) 51, 175 N. W. 666; Schachter v. Hauenstein, 92 N. J. L. (1919) 104, 105 Atl. 13; Schumacker v. Little Falls Tp., 108 Atl. (N. J. L., 1919) 113; Purvis v. Ocilla, 149 Ga. (1920) 771, 102 S. E. 241; State v. Dean, 149 Minn. (1921) 410, 184 N. W. 275; Power v. Nordstrom, 150 Minn. (1921) 228, 184 N. W. 967; Ex parte Johnson, 201 Pac. (Okla. Cr., 1921) 533; Van Hafften v. Clayton, 246 S. W. (Mo. App., 1923), 964; State v. Pulliam, 184 N. Car. (1923) 681, 114 S. E. 394; State v. Suncrest Lumber Co., 186 N. Car. (1923) 122, 118 S. E. 882; Pirkey Bros. v. Commonwealth, 134 Va. (1923) 713, 114 S. E. 764; State ex rel. v. Wertz, 91 W. Va. (1923) 622, 114 S. E. 242; State v. Weddington, 188 N. Car. (1924) 643, 125 S. E. 257; Consolidated Enterprises v. State, 150 Tenn. (1924) 148, 263 S. W. 74; State v. Chesney, 233 Pac. (Okla. Cr., 1925) 236; State v. Somberg, 204 N. W. (Nebr., 1925) 788; People v. Derose, 203 N. W. (Mich., 1925) 95. *Contra* under peculiar circumstances: Ex parte Newman, 9 Cal. (1858) 502; Ex parte Jentzsch, 112 Cal. (1896) 468, 44 Pac. 803; Strauss v. Conneaut, 23 Ohio Cir. Ct. (1902) 320. See also sec. 79, n. 4.

[34] State v. Maxcy, 1 McMul. (S. Car., 1837) 501. Justice Earle pointed out that at common law summary procedure had been used against vagrants

a violation of due process of law. A careful scrutiny of the reasoning of the court, however, shows that it did not object to the act because of any idea of an inherent right to practice law, of which a participant in a duel could not be deprived by the legislature under its power of police regulation. It was the argument that the statute made a man "judge in his own cause," that led the court to hold it not the law of the land. Furthermore, the decision was dissented to by the Chief Justice who declared that due process could not be a limitation upon the legislative power to make laws regarding health and morals.[35] It was likewise on procedural grounds that the South Carolina act, providing for summary seizure and sale of slaves brought into the state from the north of the Potomac, was held to violate due process. Here again there was no suggestion that the legislature could not regulate the slave traffic.[36] Nevertheless, procedural aspects of the statutes were the loopholes through which due process of law

[35] In re Dorsey, 7 Porter (Ala., 1838) 293. Similar laws were held void in Rison v. Farr, 24 Ark. (1865) 161, 87 Am. Dec. 52, and Ex parte Law, 35 Ga. (1866) 285. On the other hand such an act was upheld in Barker v. People, 3 Cow. (N. Y., 1824) 686, 15 Am. Dec. 322. The test oath acts growing out of the Civil War were declared void as regards both congress and the state legislatures. Ex parte Garland, 4 Wall. (U. S., 1867) 333, 18 L. ed. 366; Cummings v. Missouri, 4 Wall. (U. S., 1867) 277, 18 L. ed. 356. In the Garland case the attorney argued that the act of Congress violated the due process provision but the court made no mention of this clause.

The test oath acts were usually attacked as being *ex post facto* laws. Other cases involving test oaths are: Pierce v. Carskadon, 16 Wall. (U. S., 1872) 234, 21 L. ed. 276; In re Shorter, Fed. Cas. No. 12811 (1865); In re Baxter, Fed. Cas. No. 1118 (1866); In re Blake, 1 Blackf. (Ind., 1818) 483; In re Attorneys' Oaths, 20 Johns. (N. Y., 1823) 492; Davis v. Pierse, Wilcox & Barber, 7 Minn. (1862) 13, 82 Am. Dec. 65; Ex parte Stratton, 1 W. Va. (1866) 305; Blair v. Ridgely, 41 Mo. (1867) 63, 97 Am. Dec. 248; State v. Woodson, 41 Mo. (1867) 227, 230; Test Oath Cases, 41 Mo. (1867) 339; State v. Heighland, 41 Mo. (1867) 388, 389; Ex parte Hunter, 2 W. Va. (1867) 122; State v. Neal, 42 Mo. (1868) 119, 122; Green v. Shumway, 39 N. Y. (1868) 418, 36 How. Pr. 5; State v. Adams, 44 Mo. (1869) 570; Randolph v. Good, 3 W. Va. (1869) 551; Beirne v. Brown, 4 W. Va. (1870) 72; Ex parte Quarrier, 4 W. Va. (1870) 210, 220; Kyle v. Jenkins, 6 W. Va. (1873) 371; Lynch v. Hoffman, 7 W. Va. (1874) 553; Wooley v. Watkins, 2 Idaho (1889) 555, 22 Pac. 102; Shepherd v. Grimmett, 3 Idaho (1892) 403, 409, 31 Pac. 793; Boyd v. Mills, 53 Kans. (1894) 594, 37 Pac. 16, 25 L. R. A. 486, 42 Am. St. 306.

[36] State v. Simons, 2 Speers (S. Car., 1844) 761. See also sec. 121.

entered to question their validity, and it is significant that this protection had been so used even before the term "police power" came into general use in the state courts.

§ 117. Before due process of law could develop further it was necessary that there should be some more general recognition of what the police power really was. The hazy notions regarding this power were far from conducive to the development of any definite restriction upon it, and until the case of Commonwealth v. Alger, decided in 1853, no state court had undertaken to define it.[37] In this case Chief Justice Shaw carefully distinguished the police power from the power of eminent domain, that of taxation, or the military power. Still more important, he pointed out that the power was not without limits, and inasmuch as it rested on the basis of the common law,[38] one would quite naturally infer that whatever limitations it might have were likewise to be found in that system.[39] Two years later a decision of equal importance was handed down by the Vermont court. Chief Justice Redfield not only emphasized the common law basis of the police power,[40] but also declared that it must not be exercised in a confisca-

[37] 7 Cush. (Mass., 1853) 53. The statutes made all wharfs and piers, beyond a certain distance from the shore line, nuisances. On this question see also sec. 114, n. 16.

[38] Commonwealth v. Alger, 7 Cush. (Mass., 1853) 53 at 65, 77, 78, 90. The foundation of the concept in the *"sic utere"* maxim is pointed out on p. 86.

[39] Chief Justice Shaw made no specific mention of any limitations although he intimated that the power is not unlimited, for he pointed out that its limits are difficult to ascertain. However, inasmuch as the kind of regulations objected to in this case were common in the English common law, he concluded that the power there exercised was valid. Commonwealth v. Alger, 7 Cush. (Mass., 1853) 53 at 84-88.

[40] Thorpe v. Rutland & B. R. Co., 27 Vt. (1855) 140, 62 Am. Dec. 625. This was an action to recover damages for sheep killed by the railroad which had neglected to put up cattle guards as required by statute. The definition given to the police power by the Chief Justice indicates his conception of it. "This police power of the state extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state. According to the maxim, *sic utere tuo ut alienum non laedas,* which being of universal application it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." For additional cases see p. 426.

tory manner but must be incidental and reasonable in its scope.

§ 118. With this very clear recognition of the fact that the police power is limited and of its basis in the common law in two strong opinions by such eminent jurists, it was but a step to the position that due process of law had not only a procedural aspect but a substantive one as well and hence could be used as a limitation on this power. This step was taken in the second half of the decade 1850-1860 in connection with the litigation regarding the numerous prohibition acts of that period. In general those liquor laws which did not provide for a summary destruction of the beverages on hand, at the time the law went into force, were upheld. Summary destruction of liquor, however, was not sustained in the vast majority of cases, sometimes even though it had been manufactured or imported after the prohibition statute went into force.[41]

In 1854 the Illinois court held a prohibition law valid which made liquor a nuisance but there was no attempt on this case to abate it summarily. The court had considerable difficulty in finding any substantive limits to the police power, declaring that "the framers of the Magna Charta, and of the constitutions of the United States and of the state, never intended to modify, abridge or destroy the police powers of government. They only prohibited their exercise by *ex post facto* laws, and regulated the mode of trial for offenses." It was, however, admitted that the power could never be exercised in an arbitrary way against harmless articles, and there was an intimation that police regulations might be subject to common law principles. But the reasoning on this point was far from clear.[42] The next year the New Hampshire court upheld a statute which delegated the regulation of quasi-

[41] See sec. 119. The more important of these cases are summarized in Ernst Freund, Standards of American Legislation, pp. 197-199. See also, Freund, Police Power, secs. 205-212.

[42] Goddard v. Jacksonville, 15 Ill. (1854) 588 at 590, 60 Am. Dec. 773, per Justice Scates.

nuisances (in the case in point, bowling alleys) to municipalities, because "the legislature may well determine that an instrument which tends to facilitate vicious practices is of itself an evil which ought to be prohibited."[43] The same year the Iowa court upheld a prohibition law on the ground that, when the property was a nuisance and public benefit was concerned, it might be taken.[44] The following year the Connecticut court repudiated the idea that the fundamental principles of government or natural rights might be grounds for limiting the police power.[45] The courts in none of these cases held that due process of law had been violated because no question of procedure was involved.

In this same period, however, liquor cases were arising in which questions of procedure assumed considerable importance. These centered around the right of trial by jury.

[43] Under the statute the city by referendum election prohibited bowling alleys within twenty rods of any dwelling, store, shop, or church and any conducted within that distance were to be considered nuisances. Justice Bell pointed out that the legislative power to determine when such quasi-nuisances are in fact nuisances is plenary in the legislature. He defined a quasi-nuisance as one which might become a nuisance by the way in which it was conducted. State v. Noyes, 10 Foster (N. H., 1855) 279.

The power to regulate bowling alleys and pool and billiard rooms has been generally upheld. Murphy v. California, 225 U. S. (1912) 623, 56 L. ed. 1229; Commonwealth v. Goding, 44 Mass. (3 Metc., 1841) 130; State v. Haines, 30 Maine (1849) 65; Tanner v. Albion, 5 Hill (N. Y., 1843) 121, 40 Am. Dec. 337; Commonwealth v. Kinsley, 133 Mass. (1882) 578; In re Snell, 58 Vt. (1885) 207, 1 Atl. 566; People ex rel. v. Forbes, 52 Hun (N. Y., 1889) 30; Tarkio v. Cook, 120 Mo. (1894) 1, 25 S. W. 202; Morgan v. State, 64 Nebr. (1902) 369, 90 N. W. 108; Goytino v. McAleer, 4 Cal. App. (1906) 655, 88 Pac. 991; Burlingame v. Thompson, 74 Kans. (1906) 393, 86 Pac. 449; State v. McMonies, 75 Nebr. (1906) 443, 106 N. W. 454; Corinth v. Crittenden, 94 Miss. (1908) 41, 49 So. 525; State v. Sherow, 87 Kans. (1912) 235, 123 Pac. 866; Trammell v. Yancey, 142 Ga. (1914) 553, 83 S. E. 114; Trammell v. Rome, 142 Ga. (1914) 602, 83 S. E. 221; Purvis v. Ocilla, 149 Ga. (1920) 771, 102 S. E. 241. See also p. 234, n. 59. In two cases there is a suggestion of dissent from the established rule. Stevens v. State, 2 Ark. (1839) 291, 35 Am. Dec. 72; State v. Hall, 32 N. J. L. (1867) 158.

[44] Santo v. State, 2 Iowa (1855) 165, 167. Justice Woodward stressed the importance of the law from the standpoint of health and morals.

[45] State v. Wheeler, 25 Conn. (1856) 290. This is only *dicta* in this case, for the court goes on to declare that even if laws may be declared void on fundamental principles no such principles are violated in this case. The *dicta* was, however, applied in Beebe v. State, 6 Ind. (1855) 501, 504, 63 Am. Dec. 391.

In 1853 the New Hampshire court declared a law void because it did not give such a trial and because it virtually prevented an appeal on the decision of the lower court. The power of the legislature to make police regulations, it was said, was limited by the Constitution.[46] This was linked with the due process provision the year following when the Maine court held that since the statute did not provide for trial by jury it violated the law of the land.[47] In 1854 the reasoning was further extended, and the Rhode Island court declared a summary seizure of liquor without notice and hearing, a violation of due process.[48] In a Massachusetts case the court put practically its entire decision upon that ground,[49] and although a similar argument of the counsel in a Vermont case failed to get the support of the court, it was only because of the peculiar wording of the due process section in the constitution of that state. The court admitted that this protection prevented a summary taking of life and liberty, but inasmuch as the word "property" had been omitted in the drafting of this clause in the Vermont constitution, it did not prevent the summary destruction of liquor.[50]

[46] The act increased the penalty in case of an adverse judgment when the case was appealed. The court expressly declared (on authority of Pierce v. State, 13 N. H. (1843) 536) that the legislature has the power to regulate or prohibit the liquor traffic, but that their power ends when they attempt to subvert the constitution. In re Opinion of the Justices, 25 N. H. (1852) 537.

[47] The statute provided that before there could be an appeal from a police or justice court in liquor cases the defendant should give a bond that he would not violate any of the provisions of the act in the meantime. Justice Tenny declared that this was a violation of the law of the land for "by the process and proceedings of the common law, the accused has the right to know the charge in the whole form and substance against him, to contest it, and if not proved to the satisfaction of the jury, to demand an acquittal." Saco v. Wentworth, 37 Maine (1853) 165, 58 Am. Dec. 786. In other cases the requirements of giving bond before a trial by jury was allowed were declared void. State v. Gurney, 37 Maine (1853) 156, 58 Am. Dec. 782; Greene v. Briggs, Fed. Cas. No. 5764, 1 Curt. (U. S., 1852) 311.

[48] State v. Snow, 3 R. I. (1854) 64. Only the portion of the act regarding summary seizure and destruction of the liquor was declared void. See also Greene v. James, Fed. Cas. No. 5766, 2 Curt. (U. S., 1854) 187.

[49] Fisher v. McGirr, 1 Gray (Mass., 1854) 1, 61 Am. Dec. 381. The court's statement that due process requires a notice and hearing before either life, liberty, or property can be taken is significant.

[50] Lincoln v. Smith, 27 Vt. (1855) 328. Justice Bennett emphasized the

The more advanced courts were beginning to recognize the relation between due process of law and the police power. It had taken nearly a half century for this view to gain ground, and even at the end of that time, it cannot be said that it was the generally accepted doctrine. That the police power was not unlimited had been early appreciated in some jurisdictions, and that these limitations were to be based upon the common law was soon recognized. With these propositions established, and with the idea that due process, insofar as it was a procedural protection, was based upon the common law it was but a step to correlate these concepts and produce a substantive limitation out of the "law of the land."

§ 119. This alliance between the common law elements in due process as a procedural protection and the common law basis of the police power was formed for the first time in the Wynehamer Case.[51] The resulting substantive limitation upon the power of police regulation was given additional strength by the incorporation of certain elements from the more recently developed idea that due process was a limitation on unjust classification.[52] The modern concept of due process of law may be said to have had its origin here.

The New York statute, which was attacked in the case of Wynehamer v. The People, provided for the destruction of liquor by summary process as soon as the law went into effect unless it were kept in a residence. Even here the law made it no longer robbery to steal it. The law was held invalid by a seven to two decision, and nearly all the justices rendering opinions with the majority placed the holding distinctly upon the due process provision in the constitution, and even the judge who wrote the dissenting opinion conceded that due process was a substantive limitation on the police power. The majority not

fact that the judgment was in *rem* and not in *personam*, and hence was valid.

[51] Wynehamer v. People, 13 N. Y. (1856) 378, 12 How. Pr. 238, 2 Parker Cr. 421.

[52] See secs. 99-102.

only argued that an illegal procedure was provided, but it was also insisted that the legislature had no right to make an arbitrary classification of certain types of property which might be subject to that procedure. Indeed the court went further and declared that the legislature cannot annihilate property rights in common articles of commerce because such an exercise of the police power violated due process of law. The fact that a large proportion of the justices concurred in these views shows how powerful the idea of due process as a limitation on the police power had become.[53]

§ 120. This decision was recognized as epoch-making almost as soon as it was rendered. Some of the courts which upheld the liquor laws which were attacked after it recognized the principles involved in the Wynehamer case but pointed out the close relationship between liquor and the common law extent of the police power. Thus the New York decision was cited by the Delaware court the same year, with the statement that it did not apply to cases where the liquor was not seized in a summary manner.[54] In Alabama an act prohibiting the sale of liquor

[53] Justice Comstock declared that liquor was property and hence this act was a mere confiscation of property which is in direct violation of due process of law. A legislative act could not be the law of the land for that phrase refers to settled, not transient, law. If due process protects a person from arbitrary judicial procedure and investigation, it certainly must prevent the abolition of one kind of property rights. "It is certain that the legislature can not totally annihilate commerce in any species of property, and so condemn the property itself to extinction." Page 399.

Justice A. S. Johnson pointed out that if due process prevents a deprivation of rights except by regular judicial procedure, certainly an act of the legislature is not such procedure. The legislature can make reasonable regulations of the liquor traffic but can not prohibit liquor as property.

Justice Sheldon placed his decision on the fact that the legislature can not make special laws for to do so violates the law of the land. Furthermore, while certain police regulations of property may be valid, these must be reasonable and not confiscatory as was the case here. Legislative judgment in this type of case could not be substituted for judicial judgment.

Even the dissenting opinion of Justice T. A. Johnson does not rest on the proposition that the due process provision does not limit legislative action in regard to property, for he admitted that it does, but rather that liquor is not property within the meaning of that term. Wynehamer v. People, 13 N. Y. (1856) 378.

[54] State v. Allmond, 2 Houst. (Del., 1856) 612.

within five miles of Southern University was upheld as a reasonable regulation, although the reasoning of the Wynehamer decision was recognized as valid.[55] A similar decision was rendered in New York a decade after the principle case.[56]

But the doctrine of due process as a police power limitation was not universally accepted and some courts made deliberate efforts to combat it. Under a decision of a Rhode Island court two years later, even the place where the liquor was sold could be declared a nuisance, provided the building was not summarily destroyed.[57] In another case decided the same year, in which the summary destruction of liquor was upheld, this same court distinctly combated the "vague" interpretations of the due process clause which it found in vogue at that time.[58] A still more im-

[55] Dorman v. State, 34 Ala. (1859) 216.

[56] Metropolitan Board of Excise v. Barrie, 34 N. Y. (1866) 657.

[57] The act provided for the closing of any building if liquor were sold illegally in it. Chief Justice Ames declared that the law did not violate due process. State v. Paul, 5 R. I. (1858) 185.

This case has been widely followed: Schmidt v. Cobb, 119 U. S. (1886) 286, 30 L. ed. 321; Mugler v. Kansas, 123 U. S. (1887) 623 at 672, 31 L. ed. 205; Eilenbecker v. Plymouth County, 134 U. S. (1890) 31, 33 L. ed. 801; United States v. Cohen, 268 Fed. (1921) 420; Lewinsohn v. United States, 278 Fed. (1921) 421; United States v. Reisenweber, 288 Fed. (1923) 520; Commonwealth v. McDonough, 13 Allen (Mass., 1866) 581; McLaughlin v. State, 45 Ind. (1873) 338; Littleton v. Fritz, 65 Iowa (1885) 488, 22 N. W. 641; Pontius v. Winebrenner, 65 Iowa (1885) 591, 22 N. W. 646; Pontius v. Bowman, 66 Iowa (1885) 88, 23 N. W. 277; Martin v. Blattner, 68 Iowa (1886) 286, 25 N. W. 131, 27 N. W. 244; McLane v. Granger, 74 Iowa (1888) 152, 37 N. W. 123; State v. McManus, 65 Kans. (1902) 720, 70 Pac. 700; Burckell v. State, 47 Tex. Civ. App. (1907) 393; Fulton v. State, 171 Ala. (1911) 572, 54 So. 688; Stead v. Fortner, 255 Ill. (1912) 468, 99 N. E. 680; Brown v. Powers, 134 N. W. (Iowa, 1912) 73; Nichols v. State, 8 Okla. Cr. (1913) 550, 129 Pac. 673; Brunson v. State, 8 Okla. Cr. (1913) 665, 129 Pac. 1110; State v. Ragghianti, 129 Tenn. (1914) 560, 167 S. W. 689; State ex rel. v. Persica, 130 Tenn. (1914) 48, 168 S. W. 1056; Eliopolo v. Stubbs, 143 Ga. (1915) 602, 85 S. E. 853; Leaf v. Stubbs, 143 Ga. (1915) 606, 85 S. E. 855; Gragg v. State, 73 Okla. (1918) 132, 175 Pac. 201; Dowda v. State, 203 Ala. (1919) 441, 83 So. 324; Mack v. Westbrook, 148 Ga. (1919) 690, 98 S. E. 339; In re Love, 205 App. Div. (1923) 363, 199 N. Y. S. 530; Ivey v. State, 223 Pac. (Okla. Cr., 1924) 401; Stephens v. Watson, 1 Salk. (1701) 45. Even the equipment for making intoxicating liquor may be declared a nuisance; Banks v. State, 88 Tex. Cr. (1921) 380, 227 S. W. 670; Edge v. State, 275 S. W. (Tex. Cr., 1925) 1010; Herrin v. Fatima, 230 Ill. App. (1924) 221; State v. Zimmerman, 148 N. E. (Ill., 1925) 5.

[58] Chief Justice Ames denounced the pernicious habit of attempting to

portant and influential decision was rendered by the Michigan court, which, although it did not involve the police power, shows most clearly the reaction from the position taken in the Wynehamer case. Although the court recognized that due process included the concept of equality, it refused to go beyond that and seek "some hidden and abstruse meaning" in the Constitution.[59]

The net result of this conflict of opinion in the various courts showed, as might have been expected, that neither side was either entirely right or entirely wrong. As applied in the particular decision, the Wynehamer decision was universally repudiated, and it became firmly established that the legislature could outlaw liquor, for the reason that it contained the inherent elements of a nuisance.[60] This ruling subsequently has been sustained by

hold any statute which the courts dislike, void by wrenching some of the clauses of the constitution to cover the case. He asserted that the due process provision had a definite meaning. "It is no vague declaration concerning the rights of property, which can be made to mean anything and everything; but an intensely practical, and somewhat minute provision, guarding the rights of persons accused of crime, at the various points at which they may be exposed, when pursued, or on trial, to oppression from the state or its officials." Thus the provision should shield the accused but it must not be construed as a limitation on the power of the legislature to define crime. Since the buildings are not destroyed in this case the law is valid. State v. Keeran, 5 R. I. (1858) 497 at 505.

[59] The statute gave the town treasurer power to levy against any property in the possession of a person delinquent in his taxes, regardless of the ownership of the property. The owner was to have the right of action against the possessor at the time of the levy. Justice Manning declared: "By the 'law of the land' we understand laws that are general in their operation, and that affect the rights of all alike, and not a special act of the legislature passed to affect the rights of an individual against his will, and in a way in which the same rights of other persons are not affected by existing laws." This is not such an act and hence is valid. Mere severity of an act is not a valid objection against it. "When courts or justices, by reason of such objections, however well founded, seek for some hidden and abstruse meaning in one or more clauses of the constitution to annul a law, they encroach on the power of the legislature, and make the constitution instead of construing it. . . . The tendency of courts at the present day, we think, is too much in that direction." Even the one dissenting justice did not declare the law violated due process. Sears v. Cottrell, 5 Mich. (1856) 251 at 254, 255

[60] Probably no rule was better established even before the Eighteenth Amendment. Austin v. State, 10 Mo. (1847) 591; Jones v. People, 14 Ill (1852) 196; Our House No 2 v. State, 4 G Greene (Iowa, 1853) 172; Zumhoff v. State, 4 G. Greene (Iowa, 1854) 526; State v. Conlin, 27 Vt. (1855) 318; In re Dougherty, 27 Vt. (1855) 325; State v. Brennan's

Liquors, 25 Conn. (1856) 278; People v. Gallagher, 4 Mich. (1856) 244; State v. Donehey, 8 Iowa (1859) 396; Ingram v. State, 39 Ala. (1867) 247, 84 Am. Dec. 782; In re Locke's Appeal, 72 Pa. (1872) 491, 13 Am. Rep. 716; Schwuchow v. Chicago, 68 Ill. (1873) 444; Streeter v. People, 69 Ill. (1873) 595; Prohibitory Amendment Cases, 24 Kans. (1881) 700; State v. Stucker, 58 Iowa (1882) 496, 12 N. W. 483; State v. Teissedre, 30 Kans. (1883) 476, 2 Pac. 650; Steele v. State, 19 Tex. App. (1885) 425; Martin v. Blattner, 68 Iowa (1886) 286, 25 N. W. 131, 27 N. W. 244; Ex parte Burnside, 86 Ky. (1887) 423, 9 Ky. L. 635, 6 S. W. 276; Kaufman v. Dostal, 73 Iowa (1887) 691, 36 N. W. 643; Robison v. Haug, 71 Mich. (1888) 38, 38 N. W. 668; Bell v. State, 91 Ga. (1892) 227, 18 S. E. 288; Redding v. State, 91 Ga. (1892) 231, 18 S. E. 289; State v. Becker, 3 S. Dak. (1892) 29, 51 N. W. 1018; State ex rel. v. Aiken, 42 S. Car. (1894) 222, 20 S. E. 221; State v. Potterfield, 47 S. Car. (1896) 75, 25 S. E. 39; Decie v. Brown, 167 Mass. (1897) 290, 45 N. E. 765; State v. Sponaugle, 45 W. Va. (1898) 415, 32 S. E. 283; State ex rel. v. Bonnell, 119 Ind. (1899) 494, 21 N. E. 1101; State ex rel. v. New Orleans, 113 La. (1904) 371, 36 So. 999; Equitable Loan &c. Co. v. Edwardsville, 143 Ala. (1905) 182, 38 So. 1016; State v. Sheasley, 71 Kans. (1905) 857, 80 Pac. 997; State v. Corron, 73 N. H. (1905) 434, 62 Atl. 1044; State v. Calloway, 11 Idaho (1906) 719, 84 Pac. 27; New Orleans v. Smythe, 116 La. (1906) 685, 41 So. 33; Ruston v. Fountain, 118 La. (1906) 53, 42 So. 644; Meehan v. Board of Excise, 73 N. J. L. (1906) 382, 64 Atl. 689, 75 N. J. L. (1908) 557, 70 Atl. 363; Reed v. Collins, 5 Cal. App. (1907) 494, 90 Pac. 973; Schmidt v. Indianapolis, 168 Ind. (1907) 631, 80 N. E. 632; State ex rel. v. Skeggs, 154 Ala. (1908) 249, 46 So. 268; Zinn v. State, 88 Ark. (1908) 273, 114 S. W. 227; Rose v. State, 4 Ga. App. (1908) 588, 62 S. E. 117; Campbell v. Jackman Bros., 140 Iowa (1908) 475, 118 N. W. 755; People ex rel. v. Bashford, 128 App. Div. (1908) 351, 112 N. Y. S. 502; State v. Williams, 146 N. Car. (1908) 618, 61 S. E. 61; Ex parte Cain, 20 Okla. (1908) 125, 93 Pac. 974; Edgar v. McDonald, 106 S. W. (Tex. Civ. App., 1908) 1135; Krueger v. Colville, 49 Wash. (1908) 295, 95 Pac. 81; Marks v. State, 159 Ala. (1909) 71, 48 So. 864; Eidge v. Bessemer, 164 Ala. (1909) 599, 51 So. 246; French v. Birmingham, 165 Ala. (1909) 669, 51 So. 254; Grumbach v. Lelande, 154 Cal. (1909) 679, 98 Pac. 1059; Schwartz v. People, 46 Colo. (1909) 239, 104 Pac. 92; Allyn's Appeal, 81 Conn. (1909) 534, 71 Atl. 794; State v. Gibbs, 82 Vt. (1909) 526, 74 Atl. 229; Whitley v. State, 134 Ga. (1910) 758, 68 S. E. 716; Mix v. Board of Commrs. of Nez Perce County, 18 Idaho (1910) 695, 112 Pac. 215; Wall v. Allen, 244 Ill. (1910) 456, 91 N. E. 678; Gordon v. Corning, 174 Ind. (1910) 337, 92 N. E. 59; Clement v. Two Barrels of Whiskey, 136 App. Div. (1910) 291, 120 N. Y. S. 1044; State v. Woodard, 68 W. Va. (1910) 66, 69 S. E. 385; State v. Wamsley, 68 W. Va. (1910) 103, 69 S. E. 475; Fulton v. State, 171 Ala. (1911) 572, 54 So. 688; Cureton v. State, 135 Ga. (1911) 660, 70 S. E. 332; Fuchs v. Common Council of Grass Lake, 166 Mich. (1911) 569, 132 N. W. 96; State v. Parker Distilling Co., 236 Mo. (1911) 219, 139 S. W. 453; Hernandez v. State, 135 S. W. (Tex. Civ. App., 1911) 170; Ferrimer v. Commonwealth, 112 Va. (1911) 897, 72 S. E. 699; Ex parte Woodward, 181 Ala. (1912) 97, 61 So. 295; Atkinson v. Disher, 177 Ind. (1912) 665, 98 N. E. 807; People v. Schafran, 168 Mich. (1912) 324, 134 N. W. 29; Bloomfield v. State, 86 Ohio St. (1912) 253, 99 N. E. 309; Motlow v. State, 125 Tenn. (1912) 547, 145 S. W. 177; Williams v. State, 179 Ala. (1913) 50, 60 So. 903; Ex parte Ellsworth, 165 Cal. (1913) 677, 133 Pac. 272; Guzzi v. McAlister, 21 Cal. App. (1913) 276, 131 Pac. 336; State

ex rel. v. Board of Commrs. of Morgan County, 179 Ind. (1913) 513, 101 N. E. 813; McClure v. Topf, 112 Ark. (1914) 342, 166 S. W. 174; State v. United States Exp. Co., 164 Iowa (1924) 112, 145 N. W. 451; Illinois Cent. R. Co. v. Paducah Brew. Co., 157 Ky. (1914) 357, 163 S. W. 239; State ex rel. v. Wurdemann, 183 Mo. App. (1914) 28, 166 S. W. 348; Johnson v. Elliott, 168 S. W. (Tex. Civ. App., 1914) 968; Ex parte Peede, 75 Tex. Cr. (1914) 247, 170 S. W. 749; State ex rel. v. Delaye, 193 Ala. (1915) 500, 68 So. 993; Gherna v. State, 16 Ariz. (1915) 344, 146 Pac. 494; Delaware Saengerbund v. State, 6 Boyce (Del., 1915) 47; 95 Atl. 1078; Ex parte Pricha, 70 Fla. (1915) 265, 70 So. 406; People v. Wheeler, 185 Mich. (1915) 164, 151 N. W. 710; People ex rel. v. Holmes, 90 Misc. (1915) 63, 154 N. Y. S. 163; State v. Country Club, 173 S. W. (Tex. Civ. App., 1915) 570; State v. Briggs, 46 Utah (1915) 288, 146 Pac. 261; Gottstein v. Lister, 88 Wash. (1915) 462, 153 Pac. 595; East Prairie v. Greer, 186 S. W. (Mo. App., 1916) 952; State ex rel. v. Young, 37 S. Dak. 196, 157 N. W. (1916) 325; State v. Stoughton Club, 163 Wis. (1916) 362, 158 N. W. 93; In re Aki, 32 Cal. App. (1917) 483, 163 Pac. 338; Barbour v. State, 146 Ga. (1917) 667, 92 S. E. 70; State v. Cummins, 30 Idaho (1917) 411, 165 Pac. 216; Boerner v. Thompson, 278 Ill. (1917) 153, 115 N. E. 866; State v. Theodore, 191 S. W. (Mo., 1917) 422; State v. Hampton, 106 S. Car. (1917) 275, 91 S. E. 314; State v. Fabbri, 98 Wash. (1917) 207, 167 Pac. 133; Stratford, Inc. v. Seattle Brew. &c. Co., 94 Wash. (1917) 125, 162 Pac. 31; Yaughan v. State, 148 Ga. (1918) 517, 97 S. E. 540; Le Clair v. White, 117 Maine (1918) 335, 104 Atl. 516; Liquor Transp. Cases, 140 Tenn. (1918) 582, 205 S. W. 423; Salina v. Lewis, 52 Utah (1918) 7, 172 Pac. 286; State v. Certain Intoxicating Liquors, 51 Utah (1918) 569, 172 Pac. 1050; Pine v. Commonwealth, 121 Va. (1918) 812, 93 S. E. 652; Lucchesi v. Commonwealth, 122 Va. (1918) 872, 94 S. E. 925; Eidge v. Bessemer, 164 Ala. (1919) 599, 51 So. 246; Dowda v. State, 203 Ala. (1919) 441, 83 So. 324; Mack v. Westbrook, 148 Ga. (1919) 690, 98 S. E. 339; State v. Macek, 104 Kans. (1919) 742, 180 Pac. 985; State v. Kurent, 105 Kans. (1919) 13, 181 Pac. 603; Ex parte Zwissig, 42 Nev. (1919) 360, 178 Pac. 20; State ex rel. v. Ross, 39 N. Dak. (1919) 630, 170 N. W. 121; Pinchback v. State, 15 Okla. Cr. (1919) 402, 177 Pac. 119; Treese v. State, 16 Okla. Cr. (1919) 682, 180 Pac. 190; Ex parte Meyer, 84 Tex. Cr. (1919) 288, 207 S. W. 100; Gulf, C. &c. R. Co. v. State, 212 S. W. (Tex. Civ. App., 1919) 845; State v. Hosmer, 144 Minn. (1920) 342, 175 N. W. 683; Ex parte McGee, 44 Nev. (1920) 23, 189 Pac. 622; Michaelson v. Wall Tp., 92 N. J. L. (1920) 72, 108 Atl. 145; Ex parte Davis, 86 Tex. Cr. (1920) 168, 215 S. W. 341; Jones v. State, 17 Ala. App. (1921) 444, 85 So. 839; Brogden v. State, 18 Ala. App. (1921) 56, 88 So. 366; Ex parte Volpi, 53 Cal. App. (1921) 229, 199 Pac. 1090; Hall v. Moran, 81 Fla. (1921) 706, 89 So. 104; Johnson v. State, 81 Fla. (1921) 783, 89 So. 114; Commonwealth v. Nickerson, 236 Mass. (1921) 281, 128 N. E. 273; Farrelly v. Wells, 115 Misc. (1921) 632, 189 N. Y. S. 34; Ex parte Rankin, 45 Nev. (1921) 173, 199 Pac. 474; State v. Barksdale, 181 N. Car. (1921) 621, 107 S. E. 505; Burciago v. State, 88 Tex. Cr. (1921) 576, 228 S. W. 562; Banks v. State, 89 Tex. Cr. (1921) 438, 230 S. W. 994; State v. Niccoli, 115 Wash. (1921) 543, 197 Pac. 923; Bolton v. State, 18 Ala. App. (1922) 124, 90 So. 50; Estell v. State, 91 Tex. Cr. (1922) 481, 240 S. W. 913; State v. Jewett, 120 Wash. (1922) 36, 207 Pac. 3; In re Hixson, 61 Cal. App. (1923) 200, 214 Pac. 677; Simpson v. Commonwealth, 244 S. W. (Ky. App., 1923) 912; Commonwealth v. Wells, 244 S. W. (Ky. App., 1923) 675; McDaniel v. Commonwealth, 248 S. W. (Ky App., 1923) 895; State v. Jackson, 152 La. (1923) 656, 94 So. 150; State

the federal Supreme Court.[61] Indeed, the power which the legislature of a state held over the liquor traffic under the law as it was developed was little short of absolute.[62]

v. Pete, 153 La. (1923) 943, 96 So. 818; State v. Heilman, 246 S. W. (Mo. App., 1923) 622; White v. Findlay, 108 Ohio (1923) 475, 141 N. E. 218; Redden v. State, 210 Pac. (Okla. Cr., 1923) 556; Commonwealth v. Alderman, 275 Pa. (1923) 483, 119 Atl. 551; O'Neil v. Demers, 44 R. I. (1923) 504, 118 Atl. 677; Baker v. State, 147 Tenn. (1923) 421, 248 S. W. 548; State v. Montgomery, 121 Wash. (1923) 617, 209 Pac. 1099; State v. Micheli, 122 Wash. (1923) 286, 210 Pac. 663; State v. Henson, 91 W. Va. (1923) 701, 114 S. E. 273; Commonwealth v. Klein, 81 Pa. Super. Ct. (1923) 551.

[61] Bartemeyer v. Iowa, 18 Wall. (U. S., 1873) 129, 21 L. ed. 929; Beer Co. v. Massachusetts, 97 U. S. (1877) 25, 24 L. ed. 989; Foster v. Kansas ex rel., 112 U. S. (1884) 201, 28 L. ed. 629; Mugler v. Kansas, 123 U. S. (1887) 623, 31 L. ed. 205; Kidd v. Pearson, 128 U. S. (1888) 1, 32 L. ed. 346; Crowley v. Christensen, 137 U. S. (1890) 86, 34 L. ed. 620; Hodgson v. Vermont, 168 U. S. (1897) 262, 42 L. ed. 461; Vance v. Vandercook Co., 170 U. S. (1898) 438, 42 L. ed. 1100; Cronin v. Adams, 192 U. S. (1904) 108, 48 L. ed. 365; Durein v. State, 208 U. S. (1908) 613, 52 L. ed. 645; North Dakota v. Hanson, 215 U. S. (1910) 515, 54 L. ed. 307; Purity Extract & Tonic Co. v. Lynch, 226 U. S. (1912) 192, 57 L. ed. 184; United States v. Sandoval, 231 U. S. (1913) 28, 58 L. ed. 107; Motlow v. State, 239 U. S. (1915) 653, 60 L. ed. 487; James Clark Distilling Co. v. Western Maryland R. Co., 242 U. S. (1917) 311, 61 L. ed. 326; Crane v. Campbell, 245 U. S. (1917) 304, 62 L. ed. 304; Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. (1919) 146, 64 L. ed. 194; United States v. Standard Brewery, 251 U. S. (1919) 210, 64 L. ed. 229; Rhode Island v. Palmer, 253 U. S. (1920) 350, 64 L. ed. 946; Street v. Lincoln Safe Deposit Co., 254 U. S. (1921) 88, 65 L. ed. 151; Rose v. United States, 257 U. S. (1921) 655, 66 L. ed. 419; Corneli v. Moore, 257 U. S. (1921) 491, 66 L. ed. 332; Hawes v. Georgia, 258 U. S. (1921) 1, 66 L. ed. 431; Vigliotti v. Pennsylvania, 258 U. S. (1922) 403, 66 L. ed. 686; United States v. Lanza, 260 U. S. (1923) 377, 67 L. ed. 314; Molinari v. Maryland, 263 U. S. (1924) 685, 68 L. ed. 506; Kansas v. Bradley, 26 Fed. (1885) 289; Cantini v. Tillman, 54 Fed. (1893) 969; Kresser v. Lyman, 74 Fed. (1896) 765; Busch & Co. v. Webb, 122 Fed. (1903) 655; F. W. Cook Brew. Co. v. Garber, 168 Fed. (1909) 942; James Clark Distilling Co. v. Western Maryland R. Co., 219 Fed. (1914) 333; Hoffman Brew. Co. v. McElligott, 259 Fed. (1919) 321, 525; United States v. Minery, 259 Fed. (1919) 707; United States v. Baumgartner, 259 Fed. (1919) 722; United States v. Ranier Brew. Co., 259 Fed. (1919) 359, 260 Fed. (1919) 1022; Griesedieck Bros. Brew. Co. v. Moore, 262 Fed. (1920) 582; Maryland Distilling Co. v. Miles, 263 Fed. (1920) 597; Hannah v. Clyne, 263 Fed. (1920) 599; Scatena v. Caffey, 260 Fed. (1920) 756; Ex parte Crookshank, 269 Fed. (1921) 980; Woods v. Seattle, 270 Fed. (1921) 315; Crosland v. Dyson, 280 Fed. (1922) 105; Dryfoos v. Edwards, 284 Fed. (1923) 596; Hensberg v. United States, 288 Fed. (1923) 370; United States v. Freund, 290 Fed. (1923) 411.

See also in regard to opium United States v. Jin Fuey, 241 U. S. (1916) 394 at 401, 60 L. ed. 1061, per Justice Holmes.

[62] Prohibition is valid even if it works a deprivation of property. Mugler v. Kansas, 123 U. S. (1887) 623, 31 L. ed. 205; Eberle v. Michigan, 232

U. S. (1914) 700, 58 L. ed. 803; Ruppert v. Caffey, 251 U. S. (1920) 264, 64 L. ed. 260; Rose v. United States, 257 U. S. (1921) 655, 66 L. ed. 419, 274 Fed. (1921) 245; Corneli v. Moore, 257 U. S. (1922) 491, 66 L. ed. 332; State v. Walruff, 26 Fed. (1886) 178; Tanner v. Alliance, 29 Fed. (1886) 196; People v. Hawley, 3 Mich. (1854) 330; Fell v. State, 42 Md. (1875) 71, 20 Am. Rep. 83; Kidd v. Pearson, 128 U. S. (1888) 1, 32 L. ed. 346; State v. Barringer, 110 N. Car. (1892) 525, 14 S. E. 781; Clark v. Tower, 104 Md. (1906) 175, 65 Atl. 3; Ex parte Young, 154 Cal. (1908) 317, 97 Pac. 822; Schmitt v. F. W. Cook Brew. Co., 187 Ind. (1918) 623, 120 N. E. 19; People v. Velarde, 45 Cal. App. (1920) 520, 188 Pac. 59. *Contra:* People v. Toynbee, 20 Barb. 224, 2 Parker Cr. (N. Y., 1855) 329; Commonwealth v. Murphy, 76 Mass. (1857) 1.

It is valid to prohibit the possession of intoxicants. Crane v. Campbell, 245 U. S. (1918) 304, 62 L. ed. 304; Page v. United States, 258 U. S. (1922) 627, 66 L. ed. 799; 278 Fed. (1922) 41; United States v. Murphy, 264 Fed. (1920) 842; State v. Mellor, 13 R. I. (1882) 666; State v. Barrett, 138 N. Car. (1905) 630, 50 S. E. 506, 1 L. R. A. (N. S.) 626; State v. Denton, 164 N. Car. (1913) 530, 80 S. E. 401; Abernathy v. State, 15 Ala. App. (1917) 595, 74 So. 725; Delaney v. Plunkett, 146 Ga. (1917) 546, 547, 91 S. E. 561; State v. McCue, 141 La. (1917) 417, 75 So. 100; Ex parte Francis, 76 Fla. (1918) 304, 79 So. 753; Kracken v. State, 147 Ga. (1918) 198, 93 S. E. 198; Saddler v. State, 148 Ga. (1918) 462, 97 S. E. 79; Le Clair v. White, 117 Maine (1918) 335, 104 Atl. 516; Marasso v. Van Pelt, 77 Fla. (1919) 432, 81 So. 529; People v. Blanchard, 105 Misc. (1919) 401, 174 N. Y. S. 276; Gallovich v. People, 68 Colo. (1920) 299, 189 Pac. 34; People v. Urcavitch, 210 Mich. (1920) 431, 178 N. W. 224; People v. Willi, 109 Misc. (1920) 79, 179 N. Y. S. 542; Ex parte Fulton, 86 Tex. Cr. (1920) 149, 215 S. W. 331; Baldauf v. State, 87 Tex. Cr. (1920) 228, 220 S. W. 550; State v. Giaudrone, 109 Wash. (1920) 397, 186 Pac. 870; State v. Cassassa, 186 Pac. (Wash., 1920) 872; Reeves v. State, 88 Tex. Cr. (1921) 444, 227 S. W. 668; State v. Hessel, 112 Wash. (1921) 53, 191 Pac. 637; Ricketts v. State, 18 Ala. App. (1922) 162, 90 So. 137; 206 Ala. (1922) 701, 90 So. 925; People v. Sandy, 70 Colo. (1922) 558, 203 Pac. 671; In re Ajuria, 188 Cal. (1922) 799, 207 Pac. 516; State v. Baker, 152 La. (1923) 257, 92 So. 889; State v. Tuggle, 152 La. (1923) 747, 94 So. 377; State v. Archinard, 152 La. (1923) 786, 94 So. 395; State v. Fahey, 126 Atl. (Del., 1925) 730; Reynosa v. State, 100 Tex. Cr. (1925) 218, 272 S. W. 452. *Contra:* State v. Williams, 146 N. Car. (1908) 618, 61 S. E. 61; Ex parte Wilson, 6 Okla. Cr. (1911) 451, 119 Pac. 596; Commonwealth v. Smith, 163 Ky. (1915) 227, 173 S. W. 340; Wood v. Whitaker, 81 Fla. (1921) 653, 89 So. 118. Possession may be prohibited under the police power even if the liquor be for medicinal purposes. Piel Bros. v. Day, 278 Fed. (1922) 223; Hovermale v. United States, 5 Fed. (2d) (1925) 586. *Contra:* Commonwealth v. Fowler, 96 Ky. (1894) 166, 28 S. W. 786.

In order to make the enforcement of the law more effective liquors with low alcoholic content may be prohibited with the others. Purity Extract & Tonic Co. v. Lynch, 226 U. S. (1912) 192, 57 L. ed. 184; Pekin v. Smelzel, 21 Ill. (1859) 464, 74 Am. Dec. 105; State v. Lovell, 47 Vt. (1874) 493; State v. Guinness, 16 R. I. (1889) 401, 16 Atl. 910; State v. Gravelin, 16 R. I. (1889) 407, 16 Atl. 914; State v. Tallo, 274 S. W. (Mo., 1925) 466; United States v. Cohn, 2 Ind. Ter. (1899) 474, 52 S. W. 38; Feibelman v. State, 130 Ala. (1901) 122, 30 So. 384; State v. Bixman, 162 Mo. (1901) 1, 62 S. W. 828; State v. Frederickson, 101 Maine (1905) 37, 63 Atl. 535; Campbell v. Thomasville, 6 Ga. App. (1909) 212, 64 S. E.

815; Commonwealth v. Henry, 110 Va. (1909) 879, 65 S. E. 570; Pennell v. State, 141 Wis. (1909) 35, 123 N. W. 115; Sawyer v. Botti, 147 Iowa (1910) 453, 124 N. W. 787; State v. Fargo Bottling Works, 19 N. Dak. (1910) 396, 124 N. W. 387; State v. Stickle, 151 Iowa (1911) 303, 131 N. W. 5; Ex parte Townsend, 64 Tex. Cr. (1912) 350, 144 S. W. 628; State v. George, 136 La. (1915) 906, 67 So. 953; State v. Labrecque, 78 N. H. (1916) 182, 97 Atl. 747; State v. Kenny, 141 La. (1917) 594, 75 So. 422; State v. Marastoni, 85 Ore. (1917) 37, 165 Pac. 1177; State v. Hemrich, 93 Wash. (1917) 439, 161 Pac. 79; Kunsberg v. State, 147 Ga. (1918) 591, 95 S. E. 12; Jackson v. State, 148 Ga. (1918) 351, 96 S. E. 1001; People v. Johnson, 200 Ill. App. (1918) 603; Claunch v. State, 83 Tex. Cr. (1918) 382, 203 S. W. 891; State v. Centennial Brew. Co., 55 Mont. (1919) 500, 179 Pac. 296; State v. Reno Brew. Co., 42 Nev. (1919) 397, 178 Pac. 902; State v. Brothers, 144 Minn. (1920) 337, 175 N. W. 685; Russell v. State, 88 Tex. Cr. (1921) 582, 228 S. W. 948; Silber v. Bloodgood, 177 Wis. (1922) 608, 188 N. W. 84; Alby v. Smith, 178 Wis. (1922) 138, 189 N. W. 493. See also the cases decided since 1919 in n. 61, *supra*. *Contra:* Elder v. State, 162 Ala. (1909) 41, 50 So. 370.

Very wide latitude is allowed the legislature in the classification permitted in the liquor laws. They may prohibit intoxicants in certain districts even though other districts are not affected. Rippey v. Texas, 193 U. S. (1904) 504, 48 L. ed. 767; Burckholter v. McConnellsville, 20 Ohio St. (1870) 308; State v. Rauscher, 69 Tenn. (1878) 96; Boyd v. Bryant, 35 Ark. (1879) 69, 37 Am. Rep. 6; State v. Shroeder, 51 Iowa (1879) 197, 1 N. W. 431; State v. Joyner, 81 N. Car. (1879) 534; Trammell v. Bradley, 37 Ark. (1881) 374; Pleuler v. State, 11 Nebr. (1881) 547, 10 N. W. 481; Howell v. State, 71 Ga. (1883) 224, 51 Am. Rep. 259; State v. Berlin, 21 S. Car. (1884) 292, 53 Am. Rep. 677; Griffin v. Commonwealth, 7 Ky. L. (1885) 300; Sarrls v. Commonwealth, 83 Ky. (1885) 327, 7 Ky. L. 300; Heck v. State, 44 Ohio St. (1886) 536, 9 N. E. 305; Ex parte Campbell, 74 Cal. (1887) 20, 15 Pac. 318, 5 Am. St. 418; State v. Stovall, 103 N. Car. (1889) 416, 8 S. E. 900; Smith v. Warrior, 99 Ala. (1892) 481, 12 So. 418; Butler v. State, 89 Ga. (1892) 821, 15 S. E. 763; State v. Barringer, 110 N. Car. (1892) 525, 14 S. E. 781; Driggs v. State, 52 Ohio St. (1894) 37, 38 N. E. 882; State v. Snow, 117 N. Car. (1895) 774, 23 S. E. 322; Shea v. Muncie, 148 Ind. (1897) 14, 46 N. E. 138; Creekmore v. Commonwealth, 11 Ky. L. (1899) 566, 12 S. W. 628; Cohen v. Rice, 101 S. W. (Tex. Civ. App., 1907) 1052; La Fitte v. Fort Collins, 42 Colo. (1908) 299, 95 Pac. 927; People v. McBride, 234 Ill. (1908) 146, 84 N. E. 865; Kelly & Co. v. Conner, 122 Tenn. (1909) 339, 123 S. W. 339; Andrews v. Beaumont, 51 Tex. Civ. App. (1908) 625, 113 S. W. 614; Williams v. State, 52 Tex. Cr. (1908) 371, 107 S. W. 1121; State ex rel. v. Board of Commrs. of Natrona County, 18 Wyo. (1909) 153, 105 Pac. 295; Lochnar v. State, 111 Md. (1910) 660, 76 Atl. 586; Rapp v. Venable, 15 N. Mex. (1910) 509, 110 Pac. 834; Richter v. Lightson, 161 Cal. (1911) 260, 118 Pac. 790; Young v. Waycross, 11 Ga. App. (1912) 846, 76 S. E. 648; People v. Kaelber, 253 Ill. (1912) 552, 97 N. E. 1068; Atkinson v. Southern Exp. Co., 94 S. Car. (1913) 444, 78 S. E. 516; Ex parte Anixter, 22 Cal. App. (1913) 117, 134 Pac. 193, 166 Cal. (1914) 762, 138 Pac. 353; State v. Droppo, 126 Minn. (1914) 68, 147 N. W. 829; Ex parte Coombs, 169 Cal. (1915) 484, 147 Pac. 131; Delta v. Charlesworth, 64 Colo. (1918) 216, 170 Pac. 965; People v. Jones, 280 Ill. (1918) 259, 117 N. E. 417; State ex rel. v. Davis, 96 Ohio St. (1918) 301, 117 N. E. 358; State v. Anding, 152 La. (1922) 259, 92 So. 889. *Contra:* where the classification is purely

The principle behind the decision, however, was quite generally accepted, and henceforth due process was looked upon as a limitation upon the police power of the state if that power were arbitrarily exercised.[68]

§ 121. Very shortly after the Wynehamer case the Supreme Court of the United States handed down the famous

arbitrary. Moore v. Danville, 232 Ill. (1908) 307, 83 N. E. 845; Mandeville v. Band, 111 La. (1904) 806, 35 So. 915; People ex rel. v. Sisson, 101 Misc. (1918) 23, 166 N. Y. S. 781; 182 App. Div. (1918) 734, 169 N. Y. S. 987; Hatcher v. State, 80 Tenn. (1883) 368.

The act may prohibit sale of intoxicants in certain types of resorts. Ex parte Hays, 98 Cal. (1893) 555, 33 Pac. 337 (dance halls); State v. Phillips, 109 Miss. (1915) 22, 67 So. 651 (clubs).

Liquor sales may be curbed on Sunday. Gabel v. Houston, 29 Tex. (1867) 335; Schlict v. State, 31 Ind. (1869) 246; Piqua v. Zimmerlin, 35 Ohio St. (1880) 507; Staates v. Washington, 44 N. J. L. (1882) 605, 43 Am. Rep. 402; Nashville v. Linck, 80 Tenn. (1883) 490; Minden v. Silverstein, 36 La. Ann. (1884) 912; Portland v. Schmidt, 13 Ore. (1885) 17, 6 Pac. 221; Hood v. Von Glahn, 88 Ga. (1892) 405, 14 S. E. 564; State v. Smart, 22 Wyo. (1913) 154, 136 Pac. 452.

Liquor sales to certain types of individuals may be prohibited. Washington v. Lasky, Fed. Cas. No. 17, 230, 5 Cranch (U. S., 1837) 381 (negroes); Woods v. Prineville, 19 Ore. (1890) 108, 23 Pac. 880 (habitual drunkards); Peacock v. Limburger, 67 S. W. (Tex. Civ. App., 1902) 518 (university students); Adams v. Cronin, 29 Colo. (1902) 488, 69 Pac. 590, 63 L. R. A. 61; 192 U. S. (1904) 108, 48 L. ed. 365 (women).

The legislature may prohibit certain types of individuals from selling liquor. In re Carragher, 149 Iowa (1910) 225, 128 N. W. 352; Commonwealth v. Burk's Springs Distill. Co., 137 Ky. (1910) 224, 125 S. W. 306; Bloomfield v. State, 80 Ohio St. (1912) 253, 99 N. E. 309. *Contra:* State ex rel. v. New Orleans, 113 La. (1904) 371, 36 So. 999.

Part of the traffic may be exempted from the operation of the law. United States v. James, 256 Fed. (1919) 102; Markle v. Town Council of Akron, 14 Ohio (1846) 586; In re Intoxicating Liquor Cases, 25 Kans. (1881) 751, 37 Am. Rep. 284; Stickrod v. Commonwealth, 9 Ky. L. (1887) 563, 5 S. W. 580; Paul v. Gloucester County, 50 N. J. L. (1888) 585, 15 Atl. 272; Commonwealth v. Fowler, 96 Ky. (1894) 166, 28 S. W. 786; In re Jahn, 55 Kans. (1895) 494, 41 Pac. 950; Strauss v. Galesburg, 203 Ill. (1903) 234, 67 N. E. 836; State v. Hazelton, 78 Vt. (1906) 467, 63 Atl. 305; In re Kidd, 5 Cal. App. (1907) 159, 89 Pac. 987; Ex parte Young, 154 Cal. (1908) 317, 97 Pac. 822; State v. Grier, 4 Boyce (Del., 1913) 322, 88 Atl. 579; Ex parte Lewinsky, 66 Fla. (1913) 324, 63 So. 577; Glenn v. Southern Exp. Co., 170 N. Car. (1915) 286, 87 S. E. 136.

Occasionally the classification has been so arbitrary that the courts have declared it void. Busch & Co. v. Webb, 122 Fed. (1903) 655; Proctor v. State, 15 Okla. Cr. (1919) 338, 176 Pac. 771; Venn v. State, 85 Tex. Cr. (1919) 151, 210 S. W. 534.

[68] This was recognized within three years after the Wynehamer case. State v. Glen, 52 N. Car. (1859) 321. See also Freund, Police Power, p. 14, sec. 20.

Dred Scott decision.[64] The mention of due process in this case was, of course, purely *dicta*, and consequently its importance must not be overemphasized. Furthermore, it must be remembered that this was perhaps the most truly political decision ever handed down by the Supreme Court. So much was at stake that the judges in taking the two hundred and forty-eight pages to write their opinions were inclined to theorize on any straw which might possibly lend any weight to their precarious position. Only one of the justices (Chief Justice Taney) mentioned due process of law in his opinion. He adopted the conception of due process as a limitation upon the police power of the state and by identifying slaves with other property, he declared that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular territory of the United States, and who committed no offence against the laws, could hardly be dignified with the name of due process of law."[65]

It is still more important, however, to notice that the argument of Justice Curtis, in a strong dissenting opinion, does not deny that this provision protects property from arbitrary actions on the part of governmental authority, but insists that there is a clear distinction between slaves and other types of property. He argued accordingly that Congress under the police power, even as limited by this section, had the constitutional right to regulate, or even prohibit, slavery.[66]

[64] Dred Scott had been a slave belonging to Emerson who had taken him into the State of Illinois (at that time free territory) thence into Iowa (likewise free territory) and finally into Minnesota (free territory under the Missouri Compromise). Upon returning him to Missouri, Emerson sold Scott to Sandford. Scott sued him for his freedom in the state courts but it was refused. He then brought suit in the United States courts inasmuch as his master was a citizen of New York and he claimed to be a citizen of Missouri. The whole question in the case was whether Scott was a citizen and so could sue in the United States courts. Dred Scott v. Sandford, 19 How. (U. S., 1856) 393, 15 L. ed. 691.

[65] Dred Scott v. Sandford, 19 How. (U. S., 1856) 393 at 450, 15 L. ed. 691.

[66] The argument of Justice Curtis was to the effect that since property in slaves requires the sanction of the government to uphold it, there is a

These conflicting *dicta* are, however, rather more important than would appear at first thought. They not only show how widely the principles of the Wynehamer case were accepted, but they brought those very principles into the limelight of legal discussion. The briefs of the counsels on neither side contained any mention of due process of law, and the argument of Taney seems to have been taken bodily from the New York decision.[67] But the extensive and far-reaching political arguments which centered around this decision[68] brought the principle of due process as a limitation upon the police power, prominently into view. It is only thus that we can account for its overwhelming acceptance in the next few decades. In spite of the fact that, in the two first important cases in which it was applied, it was used in such a conspicuously erroneous manner, it lived down its early bad name and proved to be so virile that it rapidly gained in prestige after the Civil War.

clear distinction between it and other types of property. When the government determines the status of a slave there is nothing to be complained of if that status is removed. Furthermore, he pointed out that if the Missouri Compromise violated the due process clause, the like prohibition in the Northwest ordinance was also void. He likewise cited state laws prohibiting the importation of slaves from other states and says, "I am not aware that such laws, though they exist in many states were ever supposed to be in conflict with the principle of Magna Charta incorporated into the state constitutions." Certainly the federal prohibition on the importation of slaves was not void. Dred Scott v. Sandford, 19 How. (U. S., 1856) 393 at 624-627, 15 L. ed. 691.

[67] Edward Corwin, Doctrine of Judicial Review and Other Essays (Princeton, 1914), pp. 144-154. Professor Corwin suggests that since the Wynehamer case was an isolated one in this regard there is no basis for the *dicta* of Taney. He overlooks, however, the fact that the principle behind the Wynehamer case was not nearly as isolated as was its particular application. Furthermore, the position of the Chief Justice is supported by the case of State v. Simons, 2 Speers (S. Car., 1844) 761, 767, in which an act giving a forfeiture such as Scott demanded was declared unconstitutional as opposed to due process.

[68] See Republican platform, 1860, par. 8. K. H. Porter, National Party platforms (N. Y., 1924) p. 57.

CHAPTER XVIII.

THE SUPREME COURT AND THE POLICE POWER.

§ 122. The doctrine that due process of law is a limitation on the police power, which had been suggested by Chief Justice Taney before the Civil War,[1] gained ground very slowly. It was not until fifteen years had passed that it was again utilized, this time in the First Legal Tender Cases.[2] Congress had made the fiat currency which had been issued during the war, legal tender for all debts whether contracted before or after the issuance of the money, and as regards debts contracted before its passage, the court held that it impaired the obligations of contract and hence violated due process of law. Since the power to issue legal tender notes was only an implied power, Congress was limited by the law of the land to exercise it in a reasonable manner.[3] An exercise of this power which changed the value of the monetary system to the disadvantage of existing creditors could not be considered reasonable, even if it did not deprive them of due process of law in the technical sense.

Justice Miller wrote a strong dissenting opinion in which he took sharp issue with this broad application of the Fifth Amendment. His views in this regard, at least as far as the Legal Tender Acts were concerned, were destined to prevail, for they were closely followed by the court in the Second Legal Tender Cases.[4] Justice Strong, in

[1] Dred Scott v. Sandford, 19 How. (U. S., 1856) 393 at 451, 15 L. ed. 691.

[2] Hepburn v. Griswold, 8 Wall. (U. S., 1869) 603, 19 L. ed. 513.

[3] Hepburn v. Griswold, 8 Wall. (U. S., 1869) 603 at 634, 635, 19 L. ed. 513.

[4] Justice Miller declared: "The argument is too vague for my perception, by which the indirect effect of a great public measure, in depreciating the value of lands, stocks, bonds, and other contracts, renders such a law

the latter case, declared that due process "has always been understood as referring only to a direct appropriation and not to consequential injuries resulting from the exercise of lawful power."[5] As a result of this broad declaration, the promising development of due process as a police power limitation was dwarfed, although it was stoutly maintained in the dissenting opinion of the Chief Justice,[6] and Justice Strong himself, adopted it in his dissenting opinion in the Sinking Fund Cases.[7] But a doctrine which is consigned to a place in only the dissenting statements of the judges can hardly be said to have had much real vitality.

The question of the violation of due process of law was little argued before the court in the first police power cases which arose under the Fourteenth Amendment. The first of these were the Slaughter House Cases,[8] in which it was contended that the act of the state legislature deprived individuals of their liberty to engage in lawful occupations; in the case at bar, the slaughtering of cattle. That the law violated due process of law was not seriously pressed by the attorneys opposing the act and was given only a passing notice in the opinion of the court.[9] Curiously enough Justice Field in the dissenting opinion did

invalid as taking private property for public use, or as depriving the owner of it without due course of law. Hepburn v. Griswold, 8 Wall. (U. S., 1869) 603 at 637, 19 L. ed. 513. Legal Tender Cases, 12 Wall. (U. S., 1870) 457 at 551, 20 L. ed. 287. Strictly speaking the court did not overrule its former decision, but in practical effect, it amounted to a reversal and has thus been generally considered.

[5] He continued: "It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals." Legal Tender Cases, 12 Wall. (U. S., 1870) 457 at 551, 20 L. ed. 287.

[6] Legal Tender Cases, 12 Wall. (U. S., 1870) 457 at 590, 591, 20 L. ed. 287.

[7] 99 U. S. (1878) 700 at 737-739, 25 L. ed. 496.

[8] Slaughter House Cases, 16 Wall. (U. S., 1872) 36, 21 L. ed. 394. Pumpelly v. Green Bay & M. Canal Co., 13 Wall. (U. S., 1871) 166, 20 L. ed. 557, was decided more on the question of eminent domain than on the police power although both questions were involved. The court intimated, however, that the principles of the common law might control a legislative exercise of the police power in damming a river, but there was no discussion of due process.

[9] Justice Miller declared: "Under no construction of that provision [due process of law] that we have ever seen, or any that we deem admissible" could the law in question be declared void. Slaughter House Cases, 16 Wall. (U. S., 1872) 36 at 81, 20 L. ed. 557.

not even mention it, and he insisted in subsequent cases that this particular problem had neither been adequately presented or considered.[10]

[10] Justice Field in dissenting took the common law as the basis of the American fundamental law, but nowhere did he clearly suggest that due process was a limitation upon the power to make police regulations. Slaughter House Cases, 16 Wall. (U. S., 1872) 36 at 102-111, 20 L. ed. 557.

Warren contends: "In view of later decisions of the court relative to the extent of the state police power over liberty and property, it may well be doubted whether the decision might not have been otherwise, and the case been argued more fully on the point of due process and had the facts been more clearly stressed; for one of the dissenting judges, Field, always insisted, in subsequent cases, that the question whether the statute involved had any real relation whatsoever to the police power had not been properly presented or considered." Charles Warren, Supreme Court in United States History (Boston, 1922), Vol. III, p. 271.

Most of the state constitutions have specific prohibitions aimed to prevent the legislature from granting special privileges or monopolies. The early statutes or ordinances of this sort were frequently declared void on this ground or on the ground it was *ultra vires* on the part of the municipality.

Municipal water monopoly: Davenport v. Kleinschmidt, 6 Mont. (1887) 502, 13 Pac. 249; Brenham v. Brenham Water Co., 67 Tex. (1887) 542, 4 S. W. 143; Altgelt v. San Antonio, 81 Tex. (1891) 436, 17 S. W. 75, 13 L. R. A. 383; Illinois Trust & Sav. Bank v. Arkansas City W. Co., 67 Fed. (1895) 196; Edwards County v. Jennings, 89 Tex. (1896) 618, 35 S. W. 1053; Thrift v. Town Commrs. of Elizabeth City, 122 N. Car. (1898) 31, 30 S. E. 349; Livingston Waterworks v. Livingston, 53 Mont. (1917) 1, 162 Pac. 381.

Municipal gas monopoly: Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. (1856) 19; St. Louis Gaslight Co. v. St. Louis Gas, Fuel & Power Co., 16 Mo. App. (1884) 52; Parfitt v. Ferguson, 3 App. Div. (1896) 176, 38 N. Y. S. 466.

Toll Bridge monopoly: McRee v. Wilmington & R. R. Co., 47 N. Car. (1855) 186; Washington Toll Bridge Co. v. Beaufort County, 81 N. Car. (1879) 491.

Monopoly of meat sales: Bloomington v. Wahl, 46 Ill. (1868) 489.

Garbage removal monopoly: In re Lowe, 54 Kans. (1895) 757, 39 Pac. 710, 27 L. R. A. 545.

More recently, however, the attorneys have argued the questions of due process. The courts have refused to hold that a monopoly of garbage removal violates the law of the land. State v. Orr, 68 Conn. (1896) 101, 35 Atl. 770, 34 L. R. A. 279; State v. Robb, 100 Maine (1905) 180, 60 Atl. 874; Kirksey v. Wichita, 103 Kans. (1918) 761, 175 Pac. 974; Valley Spring Hog Ranch Co. v. Plagmann, 282 Mo. (1920) 1, 220 S. W. 1; Burns v. Enid, 92 Okla. (1923) 67, 217 Pac. 1038. The exclusive right to furnish school books for the state does not violate due process. Leeper v. State, 103 Tenn. (1899) 500, 53 S. W. 962, 48 L. R. A. 167. A telephone monopoly does not violate the Fourteenth Amendment. Farmers & Merchants' Co-op. Tel. Co. v. Boswell Tel. Co., 187 Ind. (1918) 371, 119 N. E. 513.

On the other hand, a few monopolies have been held void because contrary to this provision. River Rendering Co. v. Behr, 77 Mo. (1882) 91, 46 Am. Rep. 6 (Slaughter-houses); Barthet v. New Orleans, 24 Fed. (1885)

The failure of the United States Supreme Court to grasp this concept as an effective limitation upon the residual power of the state legislatures is an example of the oft-noted lethargy into which it sank during the period of the Reconstruction.[11] The legal profession seemed quickly to realize the mistake in the Slaughter House Cases, and as if to atone for its blunder, hastened to bring pressure on the court in case after case, to revive the doctrine of Taney. But the court steadfastly refused

563. (Collection of dead animals). *Contra*: Where the carcass is not forfeited; National Fertilizer Co. v. Lambert, 48 Fed. (1891) 458. In two cases the courts have laid considerable emphasis on "natural rights." Citizens' Gaslight Co. v. Louisville Gas Co., 81 Ky. (1883) 263; Iler v. Ross, 64 Nebr. (1902) 710, 90 N. W. 869, 57 L. R. A. 895, 97 Am. St. 676.

Monopolistic grants are generally sustained against any attack if they are of a distinctly police nature.

Garbage disposal: Grand Rapids v. De Vries, 123 Mich. (1900) 570, 82 N. W. 269; Rochester v. Gutberlett, 211 N. Y. (1914) 309, 105 N. E. 548; Ex parte London, 73 Tex. Cr. (1914) 208, 163 S. W. 968; O'Neal v. Harrison, 96 Kans. (1915) 339, 150 Pac. 551.

Removal of unsanitary plumbing: Dreyfus v. Boone, 88 Ark. (1908) 353, 114 S. W. 718. Slaughter-houses: Darcantel v. People's S. H. & R. Co., 44 La. Ann. (1892) 632, 11 So. 239.

Monopolies granted under the proprietary power of the state are upheld. State printing: Nash v. Lathrop, 142 Mass. (1886) 29, 6 N. E. 559; Johnson Pub. Co. v. Mills, 79 Miss. (1902) 543, 31 So. 101; Rand, McNally & Co. v. Hartranft, 29 Wash. (1902) 591, 70 Pac. 77; Dickinson v. Cunningham, 140 Ala. (1904) 527, 37 So. 345. Street lighting: Vincennes v. Citizens Gas Light Co., 132 Ind. (1892) 114, 31 N. E. 573; Reid v. Trowbridge, 78 Miss. (1901) 542, 29 So. 167; Denver v. Hubbard, 17 Colo. App. (1902) 346, 68 Pac. 993; Davenport Gas & Elec. Co. v. Davenport, 124 Iowa (1904) 22, 98 N. W. 892. Monopolies of transportation facilities are generally upheld. Pontchartrain R. Co. v. Orleans Nav. Co., 15 La. (1840) 404 (railroad); Enfield Toll Bridge Co. v. Hartford &c. R. Co., 17 Conn. (1845) 40, 42 Am. Dec. 716 (bridge); Martin v. O'Brien, 34 Miss. (1857) 21 (wharf); Broadway & L. P. Ferry Co. v. Hankey, 31 Md. (1869) 346 (ferry); Laredo v. International Bridge &c. Co., 66 Fed. (1895) 246 (bridge). Some courts have sustained grants of monopolies of other municipal utilities. Gas: People v. Bowen, 30 Barb. (N. Y., 1859) 24; Crescent City Gaslight Co. v. New Orleans Gaslight Co., 27 La. Ann. (1875) 138; Bailey v. Philadelphia, 184 Pa. (1898) 594, 39 Atl. 494; Gathright v. Byllesby & Co., 154 Ky. (1913) 106, 157 N. W. 45; Wheeling v. Natural Gas Co., 74 W. Va. (1914) 372. Water: Grant v. Davenport, 36 Iowa (1873) 396; Bartholomew v. Austin, 85 Fed. (1898) 359.

[11] See Warren, Supreme Court in United States History, Vol. III, esp. pp. 415, 416; C. W. Collins, Fourteenth Amendment and the States (Boston, 1912), pp. 21-28.

to yield.[12] An excellent example of this is to be found in the Granger Cases.[13] In upholding the Illinois law regulating the charges of grain elevators, the justice probably reflected the temper of the times,[14] but their treatment of due process in the opinion shows either a remarkable ignorance of the earlier cases on the subject, or else a deliberate intention to ignore them. It is true that Chief Justice Waite declared that due process had some relation to the police power and also that a public necessity must exist according to common-law standards in order to warrant a use of that power; but the two ideas were not linked together, and the whole subject was left enshrouded in a mystifying haze.[15]

[12] "There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them that the clause under consideration [due process of law] is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." Justice Miller, Davidson v. New Orleans, 96 U. S. (1877) 97 at 104, 24 L. ed. 616. This remark was quoted *verbatim* by Justice Field and he added: "This language was used in 1877 and now after the lapse of eight years, it may be repeated with an expression of increased surprise at the continued misconception of the purpose of the provision." Missouri Pac. R. Co. v. Humes, 115 U. S. (1885) 512 at 520, 29 L. ed. 463.

[13] Munn v. Illinois, 94 U. S. (1876) 113, 24 L. ed. 77.

[14] Warren, Supreme Court in United States History, Vol. III, pp. 314-316. It was about this case that James Bryce declared: "The Supreme Court feels the touch of public opinion." The American Commonwealth (N. Y., 1914), Vol. I, p. 274.

[15] That the regulation of warehouse charges is a legitimate exercise of the police power, see: Budd v. New York, 143 U. S. (1892) 517, 36 L. ed. 247; Brass v. North Dakota, 153 U. S. (1894) 391, 38 L. ed. 757; People v. Budd, 117 N. Y. (1889) 1, 22 N. E. 670; Belcher Sugar Refin. Co. v. St. Louis Grain Elev. Co., 101 Mo. (1890) 192, 13 S. W. 822; Longwell Transfer v. Elliott, 267 S. W. (Tex. Civ. App., 1925) 346; Alnutt v. Inglis, 12 East (K. B., 1810) 527. The same rule would seem to apply to stockyards: Stafford v. Wallace, 258 U. S. (1922) 495, 66 L. ed. 735; Cotting v. Kansas City Stkyds. Co., 79 Fed. (1897) 679; 82 Fed. (1897) 850 (reversed on other grounds, 183 U. S. (1901) 79, 46 L. ed. 92. See p. 84); Ratcliff v. Wichita Union Stkyds. Co., 74 Kans. (1906) 1, 86 Pac. 150; Union Stkyds. Co. v. Nebraska State Ry. Commission, 103 Nebr. (1919) 224, 170 N. W. 908, 172 N. W. 528. A licensing act for warehouses was upheld. Cargill v. Minnesota, 180 U. S. (1901) 452, 45 L. ed. 619. It is also valid to require a public weighing of grain. Merchant's Exch. v. Missouri, 248 U. S. (1919) 365, 63 L. ed. 300.

§ 123. It is, of course, possible to read modern ideas into the decisions of this period and to see in the opinions glimpses of the present view of the extent of due process. The fact that the court in Munn v. Illinois[16] spoke so frequently about "reasonable" charges might be taken as an indication that the law would have been held void had it fixed rates which the court deemed were either unreasonably high or low. But, as if with the purpose of precluding this very inference, the Chief Justice stated that relief in such cases must come from the legislature and not from the courts.[17] Justice Field in his dissenting opinion in the same case seemed to intimate quite clearly that the police power was limited by due process,[18] but a careful study of his subsequent statements shows that that was not the case. Nine years later he flatly declared that the Fourteenth Amendment was not "designed to interfere with the power of the state sometimes termed its police power."[19] But vestiges of the former uncertainty re-

[16] Chief Justice Waite declared that the test of the validity of rates was their reasonableness, and that the legislature must be the judge of this. Munn v. Illinois, 94 U. S. (1876) 113 at 134, 24 L. ed. 77.

[17] "We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts." Chief Justice Waite, Munn v. Illinois, 94 U. S. (1876) 113 at 134, 24 L. ed. 77.

[18] Munn v. Illinois, 94 U. S. (1876) 113 at 145, 146, 24 L. ed. 77.

[19] "But neither the [fourteenth] amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state sometimes termed its police power to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." Justice Field, Barbier v. Connolly, 113 U. S. (1885) 27 at 31, 28 L. ed. 923. See also Bartemeyer v. Iowa, 18 Wall. (U. S., 1873) 129, 21 L. ed. 929.

This *dicta* persistently hampered the development of due process as a police power regulation.

It has been repeated in a large number of opinions by the Supreme Court. Mugler v. Kansas, 123 U. S. (1887) 632 at 663, 31 L. ed. 205; Powell v. Pennsylvania, 127 U. S. (1887) 678 at 683, 32 L. ed. 253; Leisy v. Hardin, 135 U. S. (1890) 100 at 130, 34 L. ed. 128; In re Kemmler, 136 U. S. (1890) 436 at 448, 34 L. ed. 519; In re Converse, 137 U. S. (1891) 624 at 631, 34 L. ed. 796; In re Rahrer, 140 U. S. (1891) 545 at 555, 35 L. ed. 572; Davis v. Massachusetts, 167 U. S. (1897) 43 at 47, 42 L. ed. 71; L'Hote v. New Orleans, 177 U. S. (1900) 587 at 596, 44 L. ed. 899; Lochner v. New York, 198 U. S. (1905) 45 at 65, 49 L. ed. 937 (per dissent of Harlan); Western Turf Assn. v. Greenberg, 204 U. S. (1907) 359

at 363, 51 L. ed. 520; Keller v. United States, 213 U. S. (1909) 138 at 145, 53 L. ed. 737; Murphy v. California, 225 U. S. (1912) 623 at 628, 56 L. ed. 1229; Atlantic Coast Line v. Goldsboro, 232 U. S. (1914) 548, 58 L. ed. 721; Pacific Gas & E. Co. v. Police Court of Sacramento, 251 U. S. (1919) 22 at 26, 64 L. ed. 112. See also the following opinions by lower federal judges: Electric Imp. Co. v. San Francisco, 45 Fed. (1891) 593 at 595; Reeves v. Corning, 51 Fed. (1892) 774 at 778; Cantini v. Tillman, 54 Fed. (1893) 969 at 974; In re Considine, 83 Fed. (1897) 157 at 158; Glucose Refin. Co. v. Chicago, 138 Fed. (1905) 209 at 217; North American Cold Storage Co. v. Chicago, 151 Fed. (1907) 120 at 123; Wiseman v. Tanner, 221 Fed. (1914) 694 at 703; Jackson v. Cravens, 235 Fed. (1916) 212 at 216; Corvallis Creamery Co. v. Van Winkle, 274 Fed. (1921) 454; Children's Hospital v. Adkins, 284 Fed. (1922) 613 at 634; Real Silk Hosiery Mills v. Portland, 297 Fed. (1924) 897 at 899.

It has also been given a very prominent place in the decisions of the State courts. Bertholf v. O'Reilly, 74 N. Y. (1878) 509 at 519, 30 Am. Rep. 323; Davis v. State, 68 Ala. (1880) 58, 44 Am. Rep. 128; Territory v. O'Connor, 5 Dak. (1889) 397, 41 N. W. 746; Commonwealth v. Abrahams, 156 Mass. (1892) 57, 30 N. E. 79; Virginia Dev. Co. v. Crozer, Iron Co., 90 Va. (1893) 126, 17 S. E. 806, 44 Am. St. 893; State v. Myers, 42 W. Va. (1895) 822, 26 S. E. 539, 35 L. R. A. 844, 57 Am. St. 887; Bittenhaus v. Johnston, 92 Wis. (1896) 588, 66 N. W. 805, 32 L. R. A. 380; State v. Schlenker, 112 Iowa (1900) 642, 84 N. W. 698, 51 L. R. A. 347, 84 Am. St. 360; State v. Currans, 111 Wis. (1901) 431, 87 N. W. 561, 56 L. R. A. 252; Simmons v. Western Union T. Co., 63 S. Car. (1902) 425, 41 S. E. 521, 57 L. R. A. 607; Julien v. Model Bldg., L. & I. Assn., 116 Wis. (1902) 79, 92 N. W. 561, 61 L. R. A. 668; Odd Fellows' Cemetery Assn. v. San Francisco, 140 Cal. (1903) 226, 73 Pac. 987; Meffert v. State Board of Medical Registration, 66 Kans. (1903) 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811; State v. Sopher, 25 Utah (1903) 318, 71 Pac. 482, 60 L. R. A. 468, 95 Am. St. 845; Shreveport v. Schulsinger, 113 La. (1904) 9, 36 So. 870; Woods v. Cottrell, 55 W. Va. (1904) 476, 47 S. E. 275, 65 L. R. A. 616, 104 Am. St. 1004; Christy v. Elliot, 216 Ill. (1905) 31, 74 N. E. 1035, 1 L. R. A. (N. S.) 215, 108 Am. St. 196; State v. Robb, 100 Maine (1905) 180, 60 Atl. 874; In re Newell, 2 Cal. App. (1906) 767, 84 Pac. 226; Durham v. Eno Cotton Mills, 141 N. Car. (1906) 615, 54 S. E. 453, 7 L. R. A. (N. S.) 321; Fellows v. Charleston, 62 W. Va. (1907) 665, 59 S. E. 623; Opinions of the Justices, 103 Maine (1908) 506, 69 Atl. 627; Knight & Jillson Co. v. Miller, 172 Ind. (1909) 27, 87 N. E. 823; State v. Danenberg, 151 N. Car. (1909) 718, 66 S. E. 301; State v. Phillips, 107 Maine (1910) 249, 78 Atl. 283; State v. Mamlock, 58 Wash. (1910) 631 at 634, 109 Pac. 47; Selvage v. Talbott, 175 Ind. (1911) 648, 95 N. E. 114; Dirken v. Great Northern Paper Co., 110 Maine (1913) 374, 86 Atl. 320; State v. Gurry, 121 Md. (1913) 534, 88 Atl. 546; Spaulding v. McNary, 64 Ore. (1913) 491, 130 Pac. 291; People v. Damm, 183 Mich. (1914) 554, 149 N. W. 1002; State v. Brown, 170 N. Car. (1914) 714, 86 S. E. 1042; Durand v. Dyson, 271 Ill. (1916) 382, 111 N. E. 143; People v. Casa Co., 35 Cal. App. (1917) 194, 169 Pac. 454; People v. Sisson, 167 N. Y. S. (1917) 134; Fitch v. State, 102 Nebr. (1918) 361, 167 N. W. 417; Neer v. Sanitary Board, 168 N. W. (N. Dak., 1918) 601; Walcher v. First Presbyterian Church, 76 Okla. (1919) 9, 184 Pac. 106; Nolan v. Jones, 263 Pa. (1919) 124, 106 Atl. 235; Jackman v. Rosenbaum Co., 263 Pa. (1919) 158, 106 Atl. 238; Duquesne v. Fincke, 269 Pa. (1920) 112, 112 Atl. 130; Fisher Flouring Mills Co. v. Brown, 109 Wash. (1920) 680, 187 Pac. 399. "The legislative or police power is a dynamic agency, vague and undefined in its scope,

mained even in this case, for here, as in a similar statement later in the same term,[20] a loophole was left through which a particularly arbitrary statute might be attacked. Although it was still possible to infer that should the statute not "promote the health, peace, morals," etc., of the community, or not "be within the legitimate sphere of the legislative power" it would be declared unconstitutional, this was small encouragement for the zealous lawyers who continued to contend that police power enact-

which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirement of due process." Justice Pound, People ex rel. v. LaFetra, 230 N. Y. (1921) 429 at 442, 443, 130 N. E. 601; State v. Hall, 27 Wyo. (1921) 224, 194 Pac. 476; Rowland v. Morris, 152 Ga. (1922) 842, 111 S. E. 389; Williams v. State, 130 Miss. (1923) 827, 94 So. 882 at 883.

[20] "If the laws enacted by a state be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law." Justice Field, Missouri Pac. R. Co. v. Humes, 115 U. S. (1885) 512 at 520, 29 L. ed. 463.

Gradually the court interpreted the original statement in Barbier v. Connolly, 113 U. S. (1885) 27 at 31, to mean that due process did not interfere with a "proper," "legitimate" or "reasonable" exercise of the police power. Giozza v. Tiernan, 148 U. S. (1893) 657 at 662, 37 L. ed. 599; New York &c. R. Co. v. Bristol, 151 U. S. (1894) 556 at 567, 38 L. ed. 269; Gundling v. Chicago, 177 U. S. (1900) 183 at 188, 44 L. ed. 725; Cunnius v. Reading School Dist., 198 U. S. (1905) 458 at 469, 49 L. ed. 1125; Chicago B. &c. R. Co. v. Illinois, 200 U. S. (1906) 561 at 584, 50 L. ed. 596; McLean v. Arkansas, 211 U. S. (1909) 539 at 546, 53 L. ed. 315; Williams v. Arkansas, 217 U. S. (1910) 79 at 87, 54 L. ed. 673; Watson v. Maryland, 218 U. S. (1910) 173 at 177, 54 L. ed. 987; House v. Mayes, 219 U. S. (1911) 270 at 282, 55 L. ed. 213; Schmidinger v. Chicago, 226 U. S. (1913) 578 at 587, 57 L. ed. 364; Hutchinson v. Valdosta, 227 U. S. (1913) 303, 57 L. ed. 520; Barrett v. Indiana, 229 U. S. (1913) 26, 57 L. ed. 1050; Reinman v. Little Rock, 237 U. S. (1915) 171 at 177, 59 L. ed 900; Lacoste v. Department of Conservation, 263 U. S. (1924) 545 at 552, 68 L. ed. 437. This interpretation has been followed in some of the state cases. State v. Moore, 104 N. Car. (1889) 714, 10 S. E. 143, 17 Am. St. 696; Commonwealth v. Vrooman, 164 Pa. St. (1894) 306, 30 Atl. 217; State v. Muller, 48 Ore. (1906) 252, 85 Pac. 855; Commonwealth v. Henry, 110 Va. (1909) 879, 65 S. E. 570; Balch v. Glenn, 85 Kans. (1911) 735, 119 Pac. 67; New Orleans v. Le Blanc, 139 La. (1915) 113, 71 So. 248; State v. Legendre, 138 La. (1915) 154 at 158, 70 So. 70; State v. Latham, 115 Maine (1916) 176, 98 Atl. 578; In re Sumida, 177 Cal. (1918) 388, 170 Pac. 823; State v. McCormick, 142 La. (1918) 580, 77 So. 288; In re Seven Barrels of Wine, 79 Fla. (1920) 1, 83 So. 627; Des Moines v. Manhattan Oil Co., 193 Iowa (1921) 1096, 184 N. W. 823; State v. Schlemmer, 42 La. Ann. (1921) 1166, 8 So. 307; Wright v. Baltimore &c. R. Co., 146 Md. (1924) 66, 125 Atl. 881; Ex parte Sales, 108 Okla. (1925) 29, 233 Pac. 186.

ments in their states were contrary to the Fourteenth Amendment.

§ 124. The fact that these cases were so persistently presented, in spite of the repeated refusal of the court to utilize due process in this connection, is especially significant. In 1885 Justice Field quoted the statement of Justice Miller eight years before and added that in spite of that hint the cases had increased in frequency.[21] In the fifteen years previous, case after case was unsuccessfully argued on the ground that the law violated due process of law.[22] This persistence can hardly be accounted for by the possibility of a strained interpretation of an occasional stray remark in the decisions of the court. The causes lie deeper. In the first place, the debate which the Dred Scott decision had occasioned had left a profound impression on the legal thinking of the country. Even the Supreme Court had difficulty in escaping its influence, for the language in the Legal Tender cases and subsequent decisions dimly reflected it. In the state courts and particularly among the legal profession, it had a still greater influence. State courts had been continually bombarded with police power cases since the Civil War,[23] and some had weakened and declared the more arbitrary police

[21] Justice Field quoted from Davidson v. New Orleans, 96 U. S. (1877) 97 at 104 and expressed surprise that the number of cases in which due process should have been argued was increasing. Missouri Pac. R. Co. v. Humes, 115 U. S. (1885) 512, 29 L. ed. 463. See sec. 122, n. 12.

[22] Paul v. Virginia, 8 Wall. (U. S., 1869) 168, 19 L. ed. 357; Legal Tender Cases, 12 Wall. (U. S., 1870) 457, 20 L. ed. 287; Pumpelly v. Green Bay & M. Co., 13 Wall. (U. S., 1871) 166, 20 L. ed. 557; Slaughter House Cases, 16 Wall. (U. S., 1872) 36, 21 L. ed. 394; Munn v. Illinois, 94 U. S. (1876) 113, 24 L. ed. 77; Chicago, B. & Q. R. v. Iowa, 94 U. S. (1876) 155, 24 L. ed. 94; Davidson v New Orleans, 96 U. S. (1878) 97, 24 L. ed. 616; Fertilizing Co. v. Hyde Park, 97 U. S. (1878) 659, 24 L. ed. 1036; Sinking Fund Cases, 99 U. S. (1878) 700, 25 L. ed. 496; Escabana Co. v. Chicago, 107 U. S. (1883) 678, 27 L. ed. 442; Ruggles v. Illinois, 108 U. S. (1883) 526, 27 L. ed. 812; Hagar v. Reclamation Dist. No. 108, 111 U. S. (1884) 701, 28 L. ed. 569; Barbier v. Connolly, 113 U. S. (1885) 27, 28 L. ed. 923; Missouri Pac. R. Co. v. Humes, 115 U. S. (1885) 512, 29 L. ed 463. See also the list of cases in Collins, Fourteenth Amendment and the States, pp. 188 ff.

[23] These are reviewed in Cooley, Constitutional Limitations, Ch. XVI.

regulations void under the due process provision.[24] In the second place, the federal courts had not infrequently ruled that the state police power was subject to other limitations in the federal Constitution, especially those of the commerce and the obligations of contract clauses.[25] It was but natural to conclude that, should a sufficiently arbitrary case arise, the court might go a step further and hold it a violation of due process of law. But perhaps the most important reason why these cases continued to throng the docket of the Supreme Court was the rapidly changing economic and industrial conditions of the country. The rapid expansion of the railroads, the development of large scale production, the shift in immigration from northwestern to southwestern Europe, the phenomenal development of the Trans-Mississippi States, and the unprecedented growth of the cities caused problems of an economic and political nature that were tremendous.[26]

[24] Leavitt v. Thompson, 56 Barb. (N. Y., 1870) 542; In re Jacobs, 98 N. Y. (1885) 98, 50 Am. Rep. 636; People v. Marx, 99 N. Y. (1885) 377, 2 N. E. 29, 52 Am. Rep. 34; Stuart v. Palmer, 74 N. Y. (1878) 183, 30 Am. Rep. 280; Baldwin v. Smith, 82 Ill. (1873) 162; Toledo, W. &c. R. Co. v. Jacksonville, 67 Ill. (1873) 37, 16 Am. Rep. 611; Chicago & A. R. Co. v. People, 67 Ill. (1873) 11, 16 Am. Rep. 599; Ohio & M. R. Co. v. Lackey, 78 Ill. (1878) 55, 20 Am. Rep. 259; Gridley v. Bloomington, 88 Ill. (1878) 554, 30 Am. Rep. 560; Chicago v. O'Brien, 111 Ill. (1884) 532, 53 Am. Rep. 640; Kramer v. Marks, 64 Pa. (1870) 151; Commonwealth v. Wasson, 3 Cr. Law Mag. (Pa., 1882) 726; Attorney General v. Germantown &c. Tpk. Rd., 55 Pa. (1867) 466; Philadelphia v. Scott, 81 Pa. (1876) 80, 22 Am. Rep. 738; Craig v. Philadelphia, 89 Pa. (1879) 265; Rutherford's Case, 72 Pa. St. (1872) 82, 13 Am. Rep. 655; Campbell v. Dwiggins, 83 Ind. (1882) 473; Buchman v. State, 59 Ind. (1877) 1; Lowry v. Rainwater, 70 Mo. (1879) 152, 35 Am. Rep. 420; Zoeller v. Kellogg, 4 Mo. App. (1877) 103; Hey Sing Ieck v. Anderson, 57 Cal. (1881) 251; Brady v. King, 53 Cal. (1878) 44; Wilkins v. Jewett, 139 Mass. (1885) 29, 29 N. E. 214; State v. Beswick, 13 R. I. (1881) 211, 43 Am. Rep. 26; Varden v. Mount, 78 Ky. (1879) 86, 39 Am. Rep. 208; Boggs v. Commonwealth, 76 Va. (1882) 989; Camp v. Roger, 44 Conn. (1877) 291; Ex parte Nightingale, 12 Fla. (1878) 272; Atchison &c. R. Co. v. Baty, 6 Nebr. (1877) 37, 29 Am. Rep. 356; Houseman v. Kent Circuit Judge, 58 Mich. (1885) 364, 25 N. E. 369; Hallett v. Denver, 4 Colo. L. R. (1883) 565; Baltimore v. Scharf, 54 Md. (1880) 499; Torres v. Falgoust, 37 La. Ann. (1885) 497.

[25] Cooley, Constitutional Limitations, pp. 707-715.

[26] C. A. Beard, Contemporary American History (N. Y., 1914), Ch. II; Katherine Coman, Industrial History of the United States (N. Y., 1910), pp. 285-313; R. T. Ely, Studies in the Evolution of Industrial Society (N. Y., 1906); C. E. Merriam, Political Theories: Recent Times (N. Y., 1924), pp. 1-8. F. L. Paxson, Recent History of the United States (Boston, 1921),

The result of these changes in the realm of legislation was inevitable. The Greenback movement, the Granger movement, the Populist movement, and the growth of the Knights of Labor, all bear testimony to the demand which was constantly being made upon the legislatures of the states to enact this, that, or the other type of law. In many cases the political demand grew too strong, and the statute books were filled with remedial legislation, much of which was drastic and some revolutionary or unworkable. It was the unconstitutionality of this legislation which was pleaded under the due process provision before the hesitant Supreme Court.[27]

§ 125. The result of this pressure was inevitable and gradually the court began to lay the foundations of the modern doctrine. The first *dictum* came from Chief Justice Waite in the case of Stone v. Farmers Loan & Trust Co., in which the rate fixed by the state railroad commission was challenged. The commission's schedule of charges was upheld, but it was declared that, had the rate been confiscatory, it could hardly have been termed due process of law.[28] This statement was quoted with approval by the court two years later, and by then the basis for the judicial control of public utility rates may be said to have been laid.[29] This control was not immediately applied to other branches of the police power, however. In the case of Yick Wo v. Hopkins the court, although

pp. 56-75; 96-115; H. F. Gosnell, Boss Platt and his New York Machine (Chicago, 1924), pp. 1-11.

[27] Warren accounts for the persistent appeals to due process during this period by showing that the court had in the earlier decisions, from Paul v. Virginia, 8 Wall. (U. S., 1869) 168, 19 L. ed. 357, to Minor v. Happersett, 21 Wall. (U. S., 1874) 162, 22 L. ed. 627, so whittled away and restricted the privileges and immunities of citizens that there was little value in that part of the Fourteenth Amendment. Consequently, the lawyers turned to due process. Supreme Court in United States History, Vol. III, pp. 290, 291.

[28] "This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state can not require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." 116 U. S. (1866) 307 at 331, 29 L. ed. 636.

[29] Dow v. Beidelman, 125 U. S. (1888) 680, 31 L. ed. 841.

it held the law unconstitutional because there had been a delegation of unregulated discretion, made no mention of the Fourteenth Amendment as a substantive limitation on the police power.[30] In 1887 the doctrine appeared again in the case of Mulger v. Kansas. Although upholding the Kansas prohibition law, the court definitely restricted the earlier *dictum* of Justice Field, that due process was no limitation on the police power, while admitting the validity of the *dictum* as a general proposition they nevertheless added that unless there was a real relation between the act and the valid objects of the police power the law of the land would be violated.[31] This modification of the attitude of judicial *laissez-faire* was reflected as *dicta* in a number of subsequent decisions.[32]

§ 126. Although the attitude of the court had changed, the justices still hesitated to nullify police power regulations. Due process of law might have been utilized in the Yick Wo case, but the court preferred to rest its decision upon the abuse of discretion by an administrative body.

[30] 118 U. S. (1886) 356, 30 L. ed. 220.

[31] Justice Harlan delivered the opinion of the court. "It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. . . . If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution." After quoting Justice Field's statement, Barbier v. Connolly, 113 U. S. (1885) 27 at 31, 28 L. ed. 923, he added significantly: "Undoubtedly the state, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the constitution of the United States, and may not violate rights secured or guaranteed by that instrument." Mugler v. Kansas, 123 U. S. (1887) 623 at 661-663, 31 L. ed. 205.

[32] Justice Brown declared, "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." Lawton v. Steele, 152 U. S. (1894) 133 at 137, 38 L. ed. 385. See also Chicago, M. &c. R. Co. v. Minnesota, 134 U. S. (1890) 418 at 458, 33 L. ed. 970; Chicago &c. R. Co. v. Wellman, 143 U. S. (1892) 339 at 344, 36 L. ed. 176.

Case after case was presented to the court in the next fifteen years, and in every instance the attorneys were met with a refusal to apply the doctrine to the cases specifically before them, although it was frequently reaffirmed in the abstract.[33] In view of subsequent developments, indeed, it would seem that the principles which had already been so clearly stated should have been logically applied in some of these cases.[34] It was not until 1894 in the case of Reagan v. Farmers Loan and Trust Company that a state police regulation was declared unconstitutional because it was inconsistent with due process of law as a substantive requirement.[35] Even here the court relied almost exclusively upon the fact that the schedule of rates as drawn up had resulted in unjust discrimination, thus applying only the equality feature of the law of the land. This viewpoint appeared three years later in a similar opinion by the same justice, but this time it was linked rather clearly with the procedural aspects, of due process of law.[36] In neither of these cases, however, was a state statute invalidated, for the rates had been fixed by an administrative ruling of the railroad commission. The first case in which this reasoning was applied to a statute was Smyth v. Ames, decided the next year.[37] It had

[33] Dent v. West Virginia, 129 U. S. (1899) 114, 32 L. ed. 623; Powell v. Pennsylvania, 127 U. S. (1887) 678, 32 L. ed. 253; Dow v. Beidelman, 125 U. S. (1888) 680, 31 L. ed. 841; Mugler v. Kansas, 123 U. S. (1887) 623, 31 L. ed. 205; Smith v. Alabama, 124 U. S. (1888) 465, 31 L. ed. 508; People ex rel. v. Squire, 145 U. S. (1892) 175, 36 L. ed. 666; Lawton v. Steele, 152 U. S. (1894) 133, 38 L. ed. 385; Budd v. New York, 143 U. S. (1892) 517, 36 L. ed. 247; Chicago &c. R. Co. v. Wellman, 143 U. S. (1892) 339, 36 L. ed. 176; Kidd v. Pearson, 128 U. S. (1888) 1, 32 L. ed. 346.

A law requiring railroads to allow grain elevators to build on their right of way was declared void because it violated the eminent domain feature of due process. Missouri Pac. R. Co. v. Nebraska, 164 U. S. (1896) 403, 41 L. ed. 489.

[34] Particularly Powell v. Pennsylvania, 127 U. S. (1887) 678, 32 L. ed. 253; Chicago, M. & C. R. v. Minnesota, 134 U. S. (1890) 418, 33 L. ed. 970. In the later case the law was declared void, not because the rate was unreasonable but because no appeal was allowed to the court.

[35] 154 U. S. (1894) 362, 38 L. ed. 1014.

[36] Gulf, C. &c. R. Co. v. Ellis, 165 U. S. (1897) 150, 41 L. ed. 666.

[37] Smyth v. Ames, 169 U. S. (1898) 466, 42 L. ed. 819. The courts, per Justice Harlan, in holding the rates fixed by a Nebraska statute invalid

taken thirty years for the due process provision of the Fourteenth Amendment to reach its fruition as a police power limitation in its most favored field; that of railroad rates.

§ 127. The court was still more hesitant in applying it in other fields. It was not until seven more years had passed and the case of Lochner v. New York had been presented to the court, that it declared a statute regulating labor conditions void because it violated due process of law.[38] The conservatism of the state courts had undoubtedly saved the federal tribunal some difficulty in this class of cases. In a number of cases the acts which seemed most obnoxious had been declared void by the Supreme Court of the state and this prevented their appeal under the federal law as it stood at that time.[39] But this can hardly account for the whole situation, for many cases did get past the vigilance of the state courts and were in turn upheld by the United States Supreme Court.[40] The

because it found them confiscatory, gathered together the threads of this doctrine as they had been previously spun in the earlier cases.

[38] 198 U. S. (1905) 45, 49 L. ed. 937.

[39] In re Maguire, 57 Cal. (1881) 604, 40 Am. Rep. 125; Millett v. People, 117 Ill. (1886) 294, 7 N. E. 631; State v. Goodwill, 33 W. Va. (1889) 179, 10 S. E. 285; Ramsey v. People, 142 Ill. (1892) 380, 32 N. E. 364; Frorer v. People, 142 Ill. (1892) 387, 32 N. E. 366; Braceville Coal Co. v. People, 147 Ill. (1893) 66, 35 N. E. 62; Low v. Rees Print. Co., 41 Nebr. (1894) 127, 59 N. W. 362; Wheeling Bridge & Term. R. Co. v. Gilmore, 4 Ohio Cir. Dec. 366, 8 Ohio Cir. Ct. (1894) 658; In re House Bill No. 203, 21 Colo. (1895) 27, 39 Pac. 431; In re Eight-Hour Bill, 21 Colo. (1895) 29, 39 Pac. 328; Ritchie v. People, 155 Ill. (1895) 98, 40 N. E. 454; State v. Julow, 129 Mo. (1895) 163, 31 S. W. 781; People v. Warren, 13 Misc. (1895) 615, 34 N. Y. S. 942; Durkin v. Kingston Coal Co., 171 Pa. St. (1895) 193, 33 Atl. 237, 29 L. R. A. 808, 50 Am. St. 801; Johnson v. Goodyear Min. Co., 127 Cal. (1899) 4, 59 Pac. 304; State v. Haun, 61 Kans. (1899) 146, 59 Pac. 340; Gillespie v. People, 188 Ill. (1900) 176, 58 N. E. 1007; People ex rel. v. Coler, 166 N. Y. (1901) 1, 59 N. E. 716; Mathews v. People, 202 Ill. (1903) 389, 67 N. E. 28; Street v. Varney Elec. Sup. Co., 160 Ind. (1903) 338, 66 N. E. 895; Republic Iron & S. Co. v. State, 160 Ind. (1903) 379, 66 N. E. 1005; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kans. (1904) 297, 76 Pac. 848; State v. Missouri Tie & Timber Co., 181 Mo. (1904) 536, 80 S. W. 933.

[40] Hennington v. Georgia, 163 U. S. (1896) 299, 41 L. ed. 166; Western Union Tel. Co. v. James, 162 U. S. (1896) 650, 40 L. ed. 1105; Minneapolis &c. R. Co. v. Beckwith, 129 U. S. (1898) 26, 32 L. ed. 585; Allegeyer v. Louisiana, 165 U. S. (1897) 578, 41 L. ed. 832; Holden v. Hardy, 169 U. S. (1898) 366, 42 L. ed. 780; Plessy v. Ferguson, 163 U. S. (1896) 537, 41 L.

conclusion, therefore, is unescapable. Not only was the Supreme Court very slow in recognizing the full extent of the power given them by the Fourteenth Amendment, but once they had definitely realized that power, it was exercised with extreme antipathy. Indeed, even after having been literally forced upon the justices of that body, it seemed for some time that it would be consigned to a barren death. This might have occurred had not questions of procedure and of classification arisen in cases involving the police power. Confronted with these questions, the court could not shirk its duty and refuse to conform to its own precedents.

It was, then this close interrelation between procedure, classification and the police power which induced a recognition of due process of law as a valid limitation on the power of police regulation. In this respect the development of this concept by the United States Supreme Court follows, in a telescoped manner, the history of its evolution in the state courts. The first application of this doctrine to labor legislation was strikingly erroneous, being an interesting parallel to its application to the cases of liquor and slavery fifty years earlier. However, in spite of the bitter criticism which the Lochner case evoked, the doctrine was of such vitality that it again withstood the shock and became one of the cardinal elements in the present day concept of due process of law.[41]

ed. 256; Gladson v. Minnesota, 166 U. S. (1897) 427, 41 L. ed. 1064; L'Hote v. New Orleans, 177 U. S. (1900) 587, 44 L. ed. 899; Petit v. Minnesota, 177 U. S. (1900) 164, 44 L. ed. 718; Jacobson v. Massachusetts, 197 U. S. (1905) 11, 49 L. ed. 643; Otis v. Parker, 187 U. S. (1903) 606, 47 L. ed. 323; Atkin v. Kansas, 191 U. S. (1903) 207, 48 L. ed. 148; Aikens v. Wisconsin, 195 U. S. (1904) 194, 49 L. ed. 154; San Diego Land & Town Co. v. National City, 174 U. S. (1899) 739, 43 L. ed. 1154; Ohio Oil Co. v. Indiana, 177 U. S. (1900) 190, 40 L. ed. 729.

41 McLean v. Arkansas, 211 U. S. (1909) 539, 53 L. ed. 315; Coppage v. Kansas, 236 U. S. (1915) 1, 59 L. ed. 441; Rienman v. Little Rock, 237 U. S. (1915) 171, 59 L. ed. 900; Buchanan v. Warley, 245 U. S. (1917) 60, 62 L. ed. 149; Adams v. Tanner, 244 U. S. (1917) 590, 61 L. ed. 1336.

As a matter of fact, however, down to 1918 but fourteen State laws involving what is termed "social justice" had been declared void under the Fourteenth Amendment. Warren, Supreme Court In United States History, Vol. III, p. 464. Collins fails to distinguish between cases holding statutes

§ 128. The full scope of due process as a limitation on the police power has been only partially developed even at the present time, and many phases of this restriction on the legislature are still in a nebulous condition. The normal run of judicial business presents few cases in which it is necessary to push either the scope or the method of due process of law far beyond its traditional bounds. It is only in periods of great national stress that marked advances have been made in the development of this concept, and because American life has been relatively free from eras of social crisis, the development of constitutional limitation has been irregular and spasmodic. Still more important, however, is the fact that in almost every case, new developments are predicated upon the judicial reasoning of earlier decisions, if not, indeed, upon numerous *dicta* directly in point. There seems to be something in the technique or temperament of judicial reasoning which tends to foreshadow developments, sometimes years before it becomes necessary to work them out in detail.

This is excellently shown in a review of the recent decisions of the courts in which acts passed to meet conditions growing out of the World War were contested as violating due process. In the year after the United States Supreme Court was established it had declared that "the rights of necessity form a part of our law,"[42] and it has always been recognized that in times of great public calam-

void and others, and consequently his statistics are not comparable with those of Warren. See Fourteenth Amendment and the States, pp. 82, 125, 183. His peculiar arrangement of the statistics warps his conclusions to a large extent. *Ibid.*, pp. 138-162.

There is a very real need for a thorough statistical study of the whole subject of judicial review, particularly as regards the so called "general clauses." For a suggestive statement of sources and objectives of such a study see E. S. Corwin, Conference on the Science of Politics, Madison, 1923. Published in American Political Review, Vol. XVIII (Feb., 1924), pp. 119-166 at pp. 148-154. For suggestions concerning such a study, see Report of Conference on Science of Politics, N. Y., 1925, Round Table on Public Law. Published in American Political Science Review, Vol. XX (Feb., 1926), pp. 127-134.

[42] Justice McKean in Respublica v. Sparhawk, 1 Dal. (U. S., 1788) 357 at 362, 1 L. ed. 174. He cited a large number of examples of this emergency power in support of the power of Congress to direct removal of articles in time of war to prevent capture by the enemy.

ity, extreme measures might be taken. The classic examples of this arose as a result of great conflagrations[43] or military operations in time of war;[44] but in the first de-

[43] Saltpetre Case, 7 Coke (1607) 12, 13; New York City v. Lord, 17 Wend. (N. Y., 1837) 285; New York City v. Stone, 20 Wend. (N. Y., 1838) 139; White v. Charleston, 2 Hill (S. Car., 1842) 571; Taylor v. Plymouth, 49 Mass. (1844) 462; Russell v. Mayor, 2 Denio (N. Y., 1845) 461; American Print Works v. Lawrence, 21 N. J. L. (1847) 248, 249; Hale v. Lawrence, 21 N. J. L. (1848) 714, 47 Am. Dec. 190; Dunbar v. Alcalde Ayuntamiento, 1 Cal. (1850) 355; Conwell v. Emrie, 2 Ind. (1850) 35; Surocco v. Geary, 3 Cal. (1853) 69, 58 Am. Dec. 385; Ruggles v. Nantucket, 65 Mass. (1853) 433; McDonald v. Red Wing, 13 Minn. (1868) 38; Dawson v. Kuttner, 48 Ga. (1873) 133; Keller v. Corpus Christi, 50 Tex. (1879) 614, 32 Am. Rep. 613; Struve v. Droge, 10 Abb. N. C. (N. Y., 1881) 142, 62 How. Pr. 233. This falls not under the power of eminent domain but under the police power. Hence compensation need not be made. Bowditch v. Boston, 101 U. S. (1879) 16, 25 L. ed. 980. See also Freund, Police Power, secs. 534, 535. Nor is the rule founded on the theory that the property would have burned in any event. "The theory of the plea is that if the defendants had not destroyed the liquors they would have been destroyed by fire, which is alleging what can not be known, as the liquors might have been rescued from the conflagration by the energy of the citizens or of the police. Impending dangers give no immunity to one man to destroy the property of another. As well may a man in good health claim the right to take the life of his neighbor who is sick, and offer as a defense for his crime that the sick man would have died of his disease if he, the defendant, had withheld the mortal blow." Justice Clifford, Richmond v. Smith, 15 Wall. (U. S., 1872) 429 at 438, 21 L. ed. 200.

The validity of the Burnt Record Acts passed to settle land titles after conflagrations have been upheld because of the unusual features of the situation. The Illinois court declared, "It was demanded as a matter of safety in a great emergency." Bertrand v. Taylor, 87 Ill. (1877) 235. See also American Land Co. v. Zeiss, 219 U. S. (1911) 47, 55 L. ed. 82. See also *supra* sec. 90, n. 43.

[44] Private property may be removed to prevent its falling into the hands of the enemy even though the removal results in pecuniary loss to the owner. Respublica v. Sparhawk, 1 Dal. (U. S., 1788) 357, 1 L. ed. 174; Mitchell v. Harmony, 13 How. (U. S., 1851) 115, 14 L. ed. 75; United States v. Russell, 13 Wall. (U. S., 1871) 623, 20 L. ed. 474; Payne, United States Constitution (Anno.), p. 221. If the situation demands private property may be confiscated without payment. United States v. Pacific R. Co., 120 U. S. (1887) 227 at 239, 30 L. ed. 634. On the general question of military necessity as overriding property rights see: Juragua Iron Co. v. United States, 212 U. S. (1909) 297, 53 L. ed. 520; Barrow v. Page, 6 Tenn. (1818) 97; White v. Ivey, 34 Ga. (1865) 186; Farmer v. Lewis, 64 Ky. (1866) 66, 89 Am. Dec. 610; Lewis v. McGuire, 66 Ky. (1868) 202; Jones v. Richmond, 18 Gratt. (Va., 1868) 517; Sellards v. Zomes, 68 Ky. (1869) 90; Taylor v. Nashville & C. R. Co., 46 Tenn. (1869) 646, 98 Am. Dec. 474; Thomasson v. Glisson, 51 Tenn. (1871) 615; Clark v. Mitchell, 64 Mo. (1877) 564; Wallace v. Richmond, 94 Va. (1897) 204, 26 S. E. 586, 36 L. R. A. 554; In re Jones, 71 W. Va. (1913) 567, 77 S. E. 1029. Similarly the Trading with the Enemy Act has been upheld. Stoehr v. Wallace, 255 U. S. (1920) 239, 65 L. ed. 604. Likewise, the secretary of war may be

cade of the present century the doctrine was extended to include the exigencies of public health and order.[45] The

given power to regulate the conduct of private businesses around army camps without infringing the police power of the state because of the special emergency. United States v. Casey, 247 Fed. (1918) 362; Pappens v. United States, 252 Fed. (1918) 55; McKinley v. United States, 249 U. S. (1919) 397, 63 L. ed. 668; Blanc v. United States, 258 Fed. (1919) 921. See also People ex rel. v. Sisson, 102 Misc. (1918) 186, 168 N. Y. S. 501. These cases like the Selective Draft Cases, 245 U. S. (1918) 367, 62 L. ed. 349, rest on the war power, but in nature this seems to be little more than a specialized form of the police power in a great emergency. See also Gatlin v. Walton, 60 N. Car. (1864) 325. This was virtually recognized in Gilbert v. Minnesota, 254 U. S. (1920) 325, 65 L. ed. 287, in which an act prohibiting speaking against the government in war time was upheld as a police power regulation. The Espionage Act was upheld in Sugarman v. United States, 249 U. S. (1919) 182, 63 L. ed. 550; Schenck v. United States, 249 U. S. (1919) 47, 63 L. ed. 470; Frohwerk v. United States, 249 U. S. (1919) 204, 63 L. ed. 561; Debs v. United States, 249 U. S. (1919) 211, 63 L. ed. 566; Schaefer v. United States, 251 U. S. (1920) 466, 64 L. ed. 360; United States v. Hall, 248 Fed. (1918) 150; United States v. Krafft, 249 Fed. (1918) 919; Minotto v. Bradley, 252 Fed. (1918) 600; United States v. Pape, 253 Fed. (1918) 270; United States v. Schulze, 253 Fed. (1918) 377; United States v. Binder, 253 Fed. (1918) 978; Kirchner v. United States, 255 Fed. (1918) 301; Dodge v. United States, 258 Fed. (1919) 300. State espionage acts have been enforced in Ex parte Starr, 263 Fed. (1920) 145; State v. Freerks, 140 Minn. (1918) 349, 168 N. W. 23; State v. Hartung, 141 Minn. (1919) 207, 169 N. W. 712; State v. Tachin, 92 N. J. L. (1919) 269, 106 Atl. 145; see also Freund, Police Power, sec. 536.

[45] If a smallpox epidemic is raging compulsory vaccination of school children will be upheld. "To invest such a body [Board of Health] with authority over such matters was not an unusual nor an unreasonable or arbitrary requirement. Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members. . . . Smallpox being prevalent and increasing at Cambridge, the court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary and not justified by the necessities of the case. We say necessities of the case, because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all, might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons. . . . It is equally true that in every well-ordered society, charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." Justice Holmes, Jacobson v. Massachusetts, 197 U. S. (1905) 11 at 27-29, 49 L. ed. 643.

This was quoted by Justice Harlan in declaring the Kansas law, prohib-

statements in these latter cases, however, were purely *dicta* for similar laws have been upheld even though no emergency existed.[46] Because of the nebulous condition of the

iting the discharge of union men by railroads, unconstitutional. Adair v. United States, 208 U. S. (1908) 161 at 173, 52 L. ed. 436.

Upon a similar theory property which is dangerous to the public health may be destroyed. Sentell v. New Orleans &c. R. Co., 166 U. S. (1897) 698, 705, 41 L. ed. 1169; North American Cold Storage Co. v. Chicago, 211 U. S. (1908) 306, 53 L. ed. 195; Dunbar v. Augusta, 90 Ga. (1892) 390, 17 S. E. 390; Savannah v. Mulligan, 95 Ga. (1895) 323, 22 S. E. 621, 29 L. R. A. 303, 51 Am. St. 86; Dallas v. Allen, 40 S. W. (Tex. Civ. App., 1897) 324; Durand v. Dyson, 271 Ill. (1915) 382, 111 N. E. 143. Likewise, property which is a nuisance because it threatens the public safety may be abated. Miller v. Valparaiso, 10 Ind. App. (1894) 22, 37 N. E. 418; Griffin v. Gloversville, 67 App. Div. (1901) 403, 73 N. Y. S. 684; Goldstein v. Chicago, 172 Ill. App. (1912) 415; Cummings v. Lobsitz, 42 Okla. (1914) 704, 142 Pac. 993; Russell v. Fargo, 28 N. Dak. (1914) 300, 148 N. W. 610. *Contra:* Where the building itself is not a nuisance. Frank v. Atlanta, 72 Ga. (1884) 428; Bristol Door & L. Co. v. Bristol, 97 Va. (1899) 304, 33 S E 588.

[46] Note the statement of Justice Brandeis: "Long before this suit was instituted, Jacobson v. Massachusetts, 197 U. S. (1905) 11, 49 L. ed. 643, had settled that it is within the police power of a state to provide for compulsory vaccination." Zucht v. King, 260 U. S. (1922) 174 at 176, 67 L. ed. 194, affirming 225 S. W. (Tex. Civ. App., 1920) 267. Some courts have declared that the existence of an emergency is entirely immaterial in those cases involving the compulsory vaccination of school children. Viemeister v. White, 88 App. Div. (1893) 44, 84 N. Y. S. 712; Bissell v. Davidson, 65 Conn. (1894) 183, 32 Atl. 348; State ex rel. v. Board of Educ., 76 Ohio St. (1907) 297, 81 N. E. 568; State v. Shorrock, 55 Wash. (1909) 208, 104 Pac. 214; People v. McIlwain, 151 N. Y. S. (1915) 366; Hill v. Bickers, 171 Ky. (1916) 703, 188 S. W. 766. In other cases compulsory vaccination of school children was upheld even if no emergency was shown. Abeel v. Clark, 84 Cal. (1890) 226, 24 Pac. 383; In re Reveneck, 62 Mo. App. (1895) 8; In re Walters, 84 Hun (N. Y., 1895) 457; State v. Turney, 12 Ohio O. C R. N. S. (1909) 33; State Board of Health v. Watsonville, 13 Cal. App. (1910) 514, 110 Pac. 137; Lee v. March, 230 Pa. St. (1911) 351, 79 Atl. 564; People v. Ekerold, 211 N. Y. (1914) 386, 105 N. E. 670; Commonwealth v. Aiken, 64 Pa. Super. Ct. (1916) 96. A law of this nature applied to private schools as well as public has been upheld. Commonwealth v. Rowe, 218 Pa. (1907) 168, 67 Atl. 56. The Arkansas court declared it would presume the existence of an emergency. State v. Martin & Lipe, 134 Ark. (1918) 420, 204 S. W. 622. In two states compulsory vaccination of every one in a given district was upheld although no emergency was shown. Morris v. Columbus, 102 Ga. (1898) 792, 30 S. E. 850; State v. Hey, 126 N. Car. (1900) 999, 35 S. E. 459.

When an emergency can be shown, then all courts uphold compulsory vaccination of school children. Duffield v. Williamsport School Dist., 162 Pa. St. (1894) 476, 29 Atl. 742; School Directors v. Breen, 60 Ill. App. (1895) 201; Blue v. Beach, 155 Ind. (1900) 121, 56 N. E. 89; State ex rel. v. Beil, 157 Ind. (1901) 25, 60 N E. 672; State ex rel. v. Zimmerman, 86 Minn. (1902) 358, 90 N. W. 783; Hutchins v. Durham, 137 N. Car. (1904) 68, 70, 49 S. E. 46; Auten v. School Board, 83 Ark. (1907) 431,

concept of the due process the principle of public necessity seldom came into conflict with it, although there were cases in which it was said that constitutional guarantees could not be suspended no matter how great the emergency.[47] But in this group of cases, it is quite evident that the actual existence of an unusual state of affairs which would warrant extreme action was not proven to the satisfaction of the court.

The very ambiguity of the courts in the emergency

104 S. W. 130; Hammon v. Hyde Park, 195 Mass. (1907) 29, 80 N. E. 650; State ex rel. v. Cole, 220 Mo. (1909) 697, 119 S. W. 424; McSween v. Fort Worth, 129 S. W. (Tex. Civ. App., 1910) 206; Highland Park School Dist. v. McMurtry, 169 Ky. (1916) 457, 184 S. W. 390; Bright v. Beard, 132 Minn. (1916) 375, 157 N. W. 501; Zucht v. San Antonio School Bd., 170 S. W. (Tex. Civ. App., 1914) 840; Staffel v. San Antonio School Bd., 201 S. W. (Tex. Civ. App., 1918) 413; People ex rel. v. Board of Educ., 224 Mich. (1923) 388, 195 N. W. 95. Under these conditions the Massachusetts court upheld a general vaccination law for every one in the community. Commonwealth v. Pear, 183 Mass. (1903) 242, 66 N. E. 719. See also Levin v. Burlington, 129 N. Car. (1901) 184, 39 S. E. 822. There are decisions, however, to the effect that compulsory vaccination of school children is unconstitutional if there is no emergency. State ex rel. v. Board of Educ., 21 Utah (1900) 401, 60 Pac. 1013; People v. Board of Educ., 234 Ill. (1908) 422, 84 N. E. 1046; Hagler v. Larner, 284 Ill. (1919) 547, 120 N. E. 575; Waldschmit v. New Braunfels, 193 S. W. (Tex. Civ. App., 1918) 1077.

It is possible that a selective draft might be constitutional even in peace time so far as the Selective Draft Cases, 245 U. S. (1918) 366, 367, 62 L. ed. 349, are concerned. See Cox v. Wood, 247 U. S. (1917) 3, 62 L. ed. 947.

[47] Ex parte Milligan, 4 Wall. (U. S., 1866) 2, 18 L. ed. 281; Edwards v. Kearzey, 96 U. S. (1877) 595, 24 L. ed. 723; Railroad Co. v. Husen, 95 U. S. (1877) 465, 24 L. ed. 527. This has been repeated in a number of decisions since that time. "If I am right in the conclusion that this legislation amounted to a deprivation of property without due process of law, no emergency and no consequence, whatever their character, could justify the violation of constitutional rights. . . .

"Constitutional protection is more essential in times of unrest and agitation than it can be in the security of less turbulent periods. The constitution intended to protect the citizen against encroachments upon his rights impelled by existing emergencies, or supposed necessity of prompt and vigorous action. Constitutional rights, if they are to be available in time of greatest need, cannot give way to an emergency, however immediate, or justify the sacrifice of private rights secured by the constitution." Justice Day, dissenting in Wilson v. New, 243 U. S. (1917) 332 at 370-372, 61 L. ed. 755. See also United States v. Cohen Groc. Co., 255 U. S. (1921) 81 at 88, 65 L. ed. 516. That there is a difference of opinion in this regard is evident from the following cases regarding the power to stay execution of foreclosure of mortgages while the owner is in the army. Hasbrouck v. Shipman, 16 Wis. (1862) 296; Breitenbach v. Bush, 44 Pa. St. (1863) 313, 84 Am. Dec. 442; Hoffman v. Charlestown Five Cents Sav. Bank, 231 Mass. (1918) 324, 121 N. E. 15.

cases is an admirable example of the efforts which the judges are constantly making to keep the law flexible. Occasions might arise in which it would be necessary to apply the emergency doctrine, and although they much preferred to uphold legislation on other grounds if possible, they were unwilling to close the door to this line of development. The result was a mass of conflicting *dicta* which gave the law the appearance of being ultra-chaotic.

§ 129. The principles of the emergency doctrine seem, however, to be in complete accord with the fundamental general conception of due process as a police power limitation. It had long been recognized that public necessity was the measure of the extent to which the government might go in making police regulations. This seems to have been one of the elements which the court had in mind in speaking of "reasonableness" as a criterion in police power cases.[48] If the interference with private rights was but small the law would be upheld even though the corresponding benefit were not great.[49] On the other hand, if fundamental rights of individuals were abridged or denied, the invasion could only be justified by a corresponding importance of the benefit which the public might expect from the regulation.[50] This balance of convenience[51] must obviously depend upon the particular cir-

[48] Commonwealth v. Alger, 7 Cush. (Mass., 1851) 53; Toledo, W. &c. R. Co. v. Jacksonville, 67 Ill. (1873) 37, 16 Am. Rep. 611; In re Jacobs, 98 N. Y. (1885) 98, 2 N. Y. Cr. 539, 50 Am. Rep. 636; Evison v. Chicago, St. P. M. &c. R. Co., 45 Minn. (1891) 370, 48 N. W. 6, 11 L. R. A. 434.

[49] Lawton v. Steele, 152 U. S. (1894) 133, 38 L. ed. 385; Freund, Police Power, sec. 63.

[50] "The dimensions of the government's police power are identical with the dimensions of the government's duty to protect and promote the public welfare. The measure of police power must square with the measure of public necessity. The public need is the polestar for the enactment, interpretation, and application of the law." J. Wanamaker, Leonard v. State, 100 Ohio St. (1919) 456 at 459, 127 N. E. 464 at 465.

[51] For this excellent term to describe this very situation I am indebted to Professor A. B. Hall. With characteristic clearness he has pointed out the unconscious attitude of the courts in this matter in "Housing and the Police Power." Housing Problems in America, Proceedings of the Fourth National Conference on Housing (1915), pp. 3-21 at 9, 10.

cumstances surrounding the exercise of the power. In normal times we have a normal balance, but in a period of great stress, when there is an emergency to be met, unusual and even arbitrary measures may be taken.[52]

The application of these principles, however, is not nearly as simple as their statement, for there is apt to be a very wide divergence of opinion as to whether an emergency exists and what measures should be taken to meet it. These are primarily questions for legislative consideration, for they must make the first move to meet the problem,[53] but unless the courts are to abdicate their functions of judicial control over unconstitutional legislation. they cannot shirk the supervision of this class of cases any more than cases involving procedure.[54] Although the application of the emergency doctrine is a very recent development, and although there has been a vigorous dis-

[52] "Emergency laws in time of peace are uncommon but not unknown. Wholesale disaster, financial panic, the aftermath of war . . . earthquake, pestilence, famine, and fire, a combination of men or the force of circumstances may, as the alternative of confusion or chaos, demand the enactment of laws that would be thought arbitrary under normal conditions." Justice Pound, in People ex rel. v. La Fetra, 230 N. Y. (1921) 429, at 444, 130 N. E. 601.

[53] "Whether or not a public emergency existed was a question of fact, debated and debatable, which addressed itself primarily to the legislature. That it existed, promised not to be presently self-curative, and called for action, appeared from public documents and from common knowledge and observation. If the lawmaking power on such evidence has determined the existence of the emergency and has, in the main, dealt with it in a manner permitted by constitutional limitations upon legislative power, so far as the same affect the class of landlords now challenging the statutes, the legislation should be upheld." Justice Pound in People ex rel. v. La Fetra, 230 N. Y. (1921) 429 at 440, 130 N. E. 601.

[54] "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional powers." Justice Holmes, Pennsylvania Coal Co. v. Mahon, 260 U. S. (1922) 393 at 413, 67 L. ed. 322. Another angle of this same problem is discussed more fully in ch. XIX.

sent on this point in almost all of the more important cases, a study of the opinions will show that the courts are not entirely in the dark in this matter. Nowhere have they laid down any rules as such, but a survey of the decisions and reasoning of the courts shows that there are at least four considerations which are of aid in the solution of this problem.

§ 130. In the first place, the emergency must be one of great impending danger which will brook of no delay. If the danger is purely a conjectural one,[55] or if the situation does not call for immediate action, to take the property of individuals, even if it be for the public good, is sheer confiscation.[56] Under such conditions the legislature must use less drastic methods or else provide for adequate compensation for the property taken. It was partly upon this ground that the Pennsylvania Cave-In Act was declared void. Although the company had acquired the right to mine coal in a given place, the act would have made it responsible for all damages due to cave-ins. As the court pointed out, this would take from it the very right which it had purchased, and since there was no immediate danger to be met, the legislature should have resorted to the power of eminent domain.[57] On the other

[55] For an excellent discussion of the problem of dealing with apprehended or conjectural dangers by legislation see Ernst Freund, Standard of American Legislation (Chicago, 1917), pp. 84-103.

Chief Justice Taft indicated that the emergency which the Kansas court of Industrial Relations was to deal with was a mere hypothetical one, and hence that its interference with private rights could not be sustained. Wolff Packing Co. v. Court of Industrial Rel., 262 U. S. (1923) 522, 67 L. ed. 1103.

[56] For this reason the foreign language statutes were declared void. "No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state." Justice McReynolds in Meyer v. Nebraska, 262 U. S. (1923) 390 at 403, 67 L. ed. 1042. See also Bartels v. Iowa, 262 U. S. (1923) 404, 67 L. ed. 1047; Society of the Holy Name v. Pierce, 296 Fed. (1924) 928, affirmed, 268 U. S. (1925) 510, 69 L. ed. 1070. Destruction of liquor during a riot is not valid unless it may reasonably be expected that it would increase the danger not to destroy it. Herlihy v. Donohue, 52 Mont. (1916) 601, 161 Pac. 164.

[57] Pennsylvania Coal Co. v. Mahon, 260 U. S. (1922) 293, 67 L. ed. 322.

hand, when supplies are needed for the army,[58] when babies are starving because of a milk strike,[59] when the flow of interstate commerce is threatened,[60] when a shortage of fuel is impending,[61] or when a housing shortage created a wide field of profiteering,[62] an entirely different situation is presented. Under such conditions the courts have declared immediate action is necessary and appropriate.[63]

§ 131. Another ear-mark of an emergency which will warrant an extension of the police power is to be found in the fact that the situation is temporary. Although it might be possible to conceive of a sudden combination of circumstances which would require prompt drastic action and yet which might well be expected to be permanent, it would be stretching the concept to its utmost to call such a situation an emergency. Certainly, if an unusual interference with private rights is to be upheld, it must not last longer than the peculiar conditions require. Legislation framed to meet extraordinary conditions

[58] Moore v. Roxford Knitting Co., 250 Fed. (1918) 278; United States v. Pacific R. Co., 120 U. S. (1887) 227 at 239, 30 L. ed. 634.

[59] Gottlieb v. Matckins, 117 Misc. (1921) 128, 191 N. Y. S. 777.

[60] Wilson v. New, 243 U. S. (1917) 332, 61 L. ed. 755; Ft. Smith &c. R. Co. v. Mills, 253 U. S. (1920) 206, 64 L. ed. 862; Hamilton v. Kentucky Distilleries & W. Co., 251 U. S. (1919) 146, 64 L. ed. 194.

[61] United States v. Pennsylvania Cent. Coal Co., 256 Fed. (1918) 703. In the case Judge Thomson declared: "When a state of war exists, the whole nation is pledged to its successful prosecution. Its resources must be controlled and conserved, that large armies may be maintained in the field. Restrictions which in times of peace would be oppressive and unlawful become in times of war a legal necessity. Prices must be regulated and controlled, that the strong may not oppress the weak, nor be permitted to extort unreasonable profits through the stress and exigencies of war," at p. 705.

People v. Moynihan, 121 Misc. (1923) 34, 200 N. Y. S. 434. Justice Ottaway declared: "Acts may be enacted in the exercise of lawful power and appropriate to it in seasons of emergency which would be inappropriate at other times . . ." at p. 437.

[62] Block v. Hirsh, 256 U. S. (1921) 135, 65 L. ed. 865; Marcus Brown Hold. Co. v. Feldman, 256 U. S. (1921) 170, 65 L. ed. 877; Levy Leasing Co. v. Siegel, 258 U. S. (1922) 242, 66 L. ed. 595. In the latter case Justice Clarke took judicial notice of the fact that the landlord had doubled the rent within one year.

[63] For a review of the war time legislation and a criticism of its tendency to disregard private rights see C. M. Hough, "Law in War Time—1917," Harvard L. Rev., Vol. 31 (March, 1918), p. 692.

usually recognizes this and provides that it is to be in force only during the period of the emergency.[64] If such a provision is not made, or is ambiguous, the courts have interpreted the act to imply such a limitation on the ground that any other interpretation would render it unconstitutional.[65] It is, evident that, where the situation is a continuing one, the courts would be very reluctant to permit unusual methods to be taken. It was this reluctance which led Chief Justice Taft to remark that he doubted if the emergency element was an important one in the case involving the Kansas Court of Industrial Relations.[66] In

[64] Most of the emergency legislation passed by congress was for the "duration of the war," (thus the Food and Fuel Control Act, Barnes' Fed. Code, Sec. 10186) or "until the end of mobilization," (as in the act providing for War Time Prohibition. 40 Stat. L. (Nov. 21, 1918) 1046) or for two years unless sooner repealed (as in the Ball Rent Law, Barnes' Fed. Code, Supp., Sec. 10186). For an excellent summary of this legislation up to 1919 see W. F. Willoughby, Government Organization in War Time and After (N. Y., 1919).

[65] "The regulation is put and justified only as a temporary measure. . . . A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." Block v. Hirsh, 256 U. S. (1921) 135 at 157, 65 L. ed. 865, upholding the Ball Rent Law for the District of Columbia which was to last for two years.

"When the emergency ceases to exist . . . or when other material questions arise, the parties aggrieved will then be heard in their own right." Justice Pound in upholding the New York law. People ex rel. v. La Fetra, 230 N. Y. (1921) 429 at 440, 130 N. E. 601.

"The laws are not effectual any longer than the necessity demands, which may be less than the two years prescribed." Justice Crane, concurring in Guttag v. Shatzkin, 230 N. Y. (1921) 647 at 651, 130 N. E. 929 at 930, upholding the New York Rent Law. The Supreme Court had declared the law void on the express ground that the emergency might not last the two years for which the law was enacted. Guttag v. Shatzkin, 194 App. Div. (1920) 509, 186 N. Y. S. 47. This law was upheld in Marcus Brown Holding Co. v. Feldman, 256 U. S. (1921) 170, 65 L. ed. 877. See also Chastleton Corporation v. Sinclair, 264 U. S. (1924) 543, 68 L. ed. 841.

See also Hamilton v. Kentucky Distilleries Co., 251 U. S. (1919) 146, 64 L. ed. 194, upholding War-time Prohibition. Justice Brandeis declared that the law need not be confined to the period of actual hostilities but might extend to any reasonable date during which an emergency might be said to exist. But when the emergency is actually over the acts are void. Perrin v. United States, 232 U. S. (1914) 478, 58 L. ed. 691; Johnson v. Gearlds, 234 U. S. (1914) 422, 58 L. ed. 1383. In these cases it was held that prohibition could not be extended on former Indian lands after they had been sold to white settlers.

[66] Wolff Packing Co. v. Court of Industrial Relations of Kans., 262 U. S. (1923) 522, 67 L. ed. 1103. Chief Justice Taft pointed out that the emergency was not only a conjectural one, but that the law applied in all key

fact, this test of what constitutes an emergency is so well established that it is taken for granted in many of the cases.[67]

§ 132. Even when it is admitted that a situation exists which demands immediate arbitrary action of a temporary character, it must not be concluded that a free hand is given the legislature with regard to the measures to be taken. The mere existence of an emergency will not justify arbitrary and oppressive action unless that action has

industries whether large or small. He implied that the situation might be different had the law been passed to meet one particular pressing situation.

But notice that the act was held void even when applied only to such an essential industry as coal mining. Dorchy v. Kansas, 264 U. S. (1924) 286, 68 L. ed. 686. See also Wolff Packing Co. v. Court of Industrial Relations, 267 U. S. 552, 69 L. ed. 785.

[67] In the District of Columbia Minimum Wage Cases it was contended that the law was to take care of an emergency (although such a contention does not appear in the Brief for Appellants prepared by Felix Frankfurter and Mary W. Dewson (N. Y., 1922), 2 vols.), and Justice Sutherland pointed out that it could not be so considered because an emergency act must be temporary in nature. Adkins v. Children's Hospital, 261 U. S. (1923) 525 at 551, 67 L. ed. 785. The pertinence of the emergency argument in this case may be doubted, however, for under the normal conditions of judicial decision, it would seem that the law should have been upheld as a simple police power regulation. See particularly the dissenting opinion of Chief Justice Taft.

Minimum wage laws for women have been consistently upheld by the state courts. Stettler v. O'Hara, 69 Ore. (1914) 519, 139 Pac. 743; Simpson v. O'Hara, 70 Ore. (1914) 261, 141 Pac. 158 (affirmed by a divided court, 243 U. S. (1917) 629, 61 L. ed. 937); State v. Crow, 130 Ark. (1917) 272, 197 S. W. 4; Williams v. Evans, 139 Minn. (1917) 32, 165 N. W. 495, 166 N. W. 504; Holcombe v. Creamer, 231 Mass. (1918) 99, 120 N. E. 354; Larsen v. Rice, 100 Wash. (1918) 642, 171 Pac. 1037; Miller Tel. Co. v. Minimum Wage Commn., 145 Minn. (1920) 262, 177 N. W. 341; Spokane Hotel Co. v. Younger, 113 Wash. (1920) 359, 194 Pac. 595; Poye v. State, 89 Tex. Cr. (1921) 182, 230 S. W. 161. But see Street v. Varney Elec. Sup. Co., 160 Ind. (1903) 338, 66 N. E. 895. The Minimum Wage Cases, however, have not overruled Muller v. Oregon, 208 U. S. (1908) 412, 52 L. ed. 551. Hence it is still valid to regulate the hours of women's work and the language of the court indicates that the law in the Minimum Wage Cases will be strictly limited. Radice v. New York, 264 U. S. (1924) 292, 295, 68 L. ed. 690.

The Pennsylvania Coal Cave-In Law was obnoxious likewise because it was not limited to a temporary emergency. Pennsylvania Coal Co. v. Mahon, 260 U. S. (1922) 393, 67 L. ed. 322.

"This was not a permanent fixing [of wages on interstate carriers] but in the nature of things a temporary one which left the will of the employers and employees to control at the end of the period if their dispute had been ceased." Chief Justice White in Wilson v. New, 243 U. S. (1917) 332 at 356, 357, 61 L. ed. 755.

a real prospect of meeting the exigencies of the situation. Such a rule as this is of course necessary to prevent abuses of legislative power under the guise of dealing with overwhelming dangers. It has long been recognized that no matter how great the emergency, the legislature cannot appropriate to itself any new power but must limit its measures to exercises of powers actively or latently possessed by constitutional right.[68] In meeting the danger which has arisen, it is necessary that the legislature use only these means which may reasonably be expected to cope with the situation. For this reason the destruction of liquor during a riot was declared unconstitutional when it could not be shown that the mere presence of the liquor caused a further danger.[69] But the cases involving the emergency rent laws show that the legislature has a very wide discretion as to the means which it may employ. The courts upheld acts giving a commission power to fix rents, acts prohibiting suits to recover unreasonable rents, and acts changing the legal methods by which a tenant could be ousted by the landlord.[70]

[68] In dissenting to the decision upholding the Adamson Law Justice Pitney declared, "an emergency can neither create a power nor excuse a defiance of the limitations upon the powers of the government." Wilson v. New, 243 U. S. (1917) 332 at 377, 61 L. ed. 755. To this Chief Justice White answered "nor is it an answer to this view to suggest that the situation was one of emergency and that emergency can not be made the source of power. Ex parte Milligan [4 Wall. (U. S., 1866) 2, 18 L. ed. 281]. The proposition begs the question, since although an emergency may not call into life a power which has never lived, nevertheless, emergency may afford a reason for the exertion of a living power already enjoyed." *Ibid.*, at 348.

[69] Herlihy v. Donohue, 52 Mont. (1916) 601, 161 Pac. 164. For a similar reason the Foreign Language Acts, which prohibited the teaching of a foreign language in any school under the eighth grade, were declared void. The act had no relation to the war emergency. Meyer v. Nebraska, 262 U. S. (1923) 390, 67 L. ed. 1042; Bartels v. Iowa, 262 U. S. (1923) 404, 67 L. ed. 1047.

This principle is a well recognized one in normal police power cases. Perhaps its most recent expression is in the decision of the Federal Court declaring the Oregon law prohibiting children from eight to sixteen attending private schools. Society of the Holy Name v. Pierce, 296 Fed. (1924) 928 affirmed, 268 U. S. (1925) 510, 69 L. ed. 1070.

[70] Rents in the District of Columbia were to be fixed by a commission. Block v. Hirsh, 256 U. S. (1921) 135, 65 L. ed. 865. The New York Law prohibited the charging of unreasonable rents and gave the tenant the right to occupy the premises as long as certain conditions were fulfilled. Marcus

Perhaps the strongest case to show that the power of the legislature is not unlimited even in cases of emergency is the one arising out of the Lever Act. An obscure line of *dicta* running back as far as 1891 had intimated that an act which did not state definitely the offense which was prohibited would be unconstitutional, because it violated due process of law.[71] In 1914 the Kentucky anti-trust act was declared void for this reason,[72] but the rule was so specialized in nature that it attracted little attention. If any rule would give way before an overwhelming necessity, one would think this one might. The United States Supreme Court, however, realized the danger which inhered in the situation, consequently when the Lever Act was presented, it was declared unconstitutional because of its indefinite features.[73] As Chief Justice White pointed

Brown Holding Co. v. Feldman, 256 U. S. (1921) 170, 65 L. ed. 877. On the other hand, the Saulsbury Resolution preventing increases in rent in the District of Columbia was declared void without opinion. Groot v. Reilly, 254 U. S. (1920) 661, 65 L. ed. 463. The emergency seems not to have been strongly pressed on the courts in these cases. See Willson v. McDonnell, 265 Fed. (1919) 432; Groot v. Reilly, 266 Fed. (1919) 1008; Hirsh v. Block, 267 Fed. (1920) 614.

The New York rent law was also upheld in Guttag v. Shatzkin, 113 Misc. (1920) 362, 185 N. Y. S. 71; 230 N. Y. (1921) 647, 130 N. E. 929; People v. La Fetra, 230 N. Y. (1921) 429, 130 N. E. 601; Levy Leasing Co. v. Siegel, 230 N. Y. (1921) 634, 130 N. E. 923; 258 U. S. (1922) 242, 66 L. ed. 595.

In commenting upon these decisions Justice Holmes declared: "The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law." Pennsylvania Coal Co. v. Mahon, 260 U. S. (1922) 393 at 416, 67 L. ed. 322.

[71] United States v. Brewer, 139 U. S. (1891) 278 at 288, 35 L. ed. 190; Waters-Pierce Oil Co. v. Texas, 212 U. S. (1909) 86 at 108, 53 L. ed. 417; Standard Oil Co. v. United States, 221 U. S. (1911) 1 at 69, 70, 55 L. ed. 619; Nash v. United States, 229 U. S. (1913) 373, 57 L. ed. 1232.

[72] International Harvester Co. v. Kentucky, 234 U. S. (1914) 216, 58 L. ed. 1284; American Seeding Mach. Co. v. Kentucky, 236 U. S. (1915) 660, 59 L. ed. 773.

[73] The act penalized any person making "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." The solicitor general contended that the war conditions required a regulation such as this and that it was impracticable to lay down any fixed scale of profits because circumstances are different in each case. To this, Chief Justice answered that the evidence in the various cases before the court, as well as the records of the administration in enforcing the law, proved that it had been applied differently in different cases. "The section forbids no specific or

out, the act prohibited no specific act but merely declared it a penal offense to charge more than a reasonable price for necessary articles of life. This would result in a different rule being applied by each jury according to their varying ideas of reasonableness, and it was preposterous to ask merchants to obey a law which they could not know. Even the dissenting justices did not claim that the law was valid.[74] It cannot be doubted, therefore, that there are limits beyond which the legislative body may not go even in times of greatest emergency, and from this case we may also conclude that acts which give no assurance of remedying the situation, and which are in themselves arbitrary, will not be upheld.[75]

§ 133. One may wonder why such a rule as this was not applied in respect to the Adamson Law. The act of congress fixing the wages of the trainmen on interstate carriers was upheld because of the imminent danger of a

definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." United States v. Cohen Groc. Co., 255 U. S. (1921) 81 at 39, 65 L. ed. 516. See also Chenoweth v. State Bd. of Med. Examrs., 57 Colo. (1913) 74, 141 Pac. 132; Hygrade Provision Co. v. Sherman, 266 U. S. (1925) 497, 69 L. ed. 402; General Const. Co. v. Connally, 3 Fed. (2d) (1924) 666. But if the State Supreme Court construes the law as valid and definite, the Federal Supreme Court will not reverse the decision. Southeastern Exp. Co. v. Miller, 264 U. S. (1924) 535, 68 L. ed. 836.

[74] Justices Pitney and Brandeis dissented on the ground that the offense charged was not prohibited by the act and so it was not necessary to decide the constitutionality of it. United States v. Cohen Groc. Co., 255 U. S. (1921) 81, 65 L. ed. 516.

[75] If the law is a civil one much wider latitude is allowed to the legislature in the matter of definiteness. Thus the New York Rent Law was fully as indefinite as the Lever Act but was upheld because it imposed no criminal penalty on the landlord for charging extortionate rates. Justice Clarke declared that the law was as definite as "just compensation" in the constitution and so should be upheld. Levy Leasing Co. v. Siegel, 258 U. S. (1922) 242 at 249, 250, 66 L. ed. 595. But see Small Co. v. American Sugar R. Co., 267 U. S. (1925) 233, 69 L. ed. 589.

Thus definiteness does not necessarily mean exactness. Hygrade Provision Co. v. Sherman, 266 U. S. (1925) 497, 69 L. ed. 402.

railroad strike which threatened to tie up the entire country at a most critical time.[76] There was no question of the reality of the emergency and the law as passed was admitted by all to be but a temporary measure. Nevertheless, the expedient of resorting to the doctrine of emergency in order to permit any single group of men to force congress to legislate in their favor, at the expense of the rest of the country, is a very dangerous one from the point of view of public policy, as well as being of very doubtful constitutional validity. Four of the justices dissented from the decision, and Chief Justice Taft has subsequently declared that it "went to the border line."[77]

The essential difficulty seems not to have been stressed either in the arguments of the counsel or in the dissenting opinions. If it be admitted that the act of Congress was reasonably calculated to prevent or remove the impending danger, it was, in all probability, a valid exercise of the emergency power. Judged by subsequent developments in this same crisis, the act seems to have been a success, and on this basis perhaps the decision could be justified were it not for the precedent which it established. But it should be noted that the crisis was passed before the court rendered its decision. Furthermore, there was nothing in the law as passed to insure a permanent settlement of the

[76] The railroad trainmen threatened to strike unless they were given an eight-hour day with extra pay for overtime. A compromise could not be effected with the railroad executives and the country was faced with a complete tie-up of its transportation system. Congress passed the Adamson Act which fixed the basic day at eight hours, and provided that the men should receive the same pay for eight hours that they had formerly received for ten. This rate of pay was to be effective until thirty days after the commission appointed to investigate the dispute had reported. The decision upholding the act rested on the power of Congress to secure an uninterrupted flow of interstate commerce rather than on the power to regulate the labor contract. Wilson v. New, 243 U. S. (1917) 332, 61 L. ed. 755; Ft. Smith &c. R. Co. v. Mills, 253 U. S. (1920) 206, 64 L. ed. 862.

[77] "It is not too much to say that the ruling in Wilson v. New went to the border line, although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster. Certainly there is nothing to justify extending the drastic regulation sustained in that exceptional case to the one before us." Wolff Pack. Co. v. Court of Industrial Relations of Kansas, 262 U. S (1923) 522 at 544, 67 L. ed. 1103, per Chief Justice Taft.

difficulty. The brotherhoods could have accepted the increase in wages which it gave them and forthwith threatened another strike unless the scale of pay was still further raised. That the crisis did not thus develop was due not to the efficiency of the law, but to the good sense and able leadership of the railroad brotherhoods.[78] There was nothing in the act to compel the workers to accept the settlement which it enacted. Other forces, particularly the entrance of the United States into the World War and the rapid rise in the cost of living which resulted therefrom, were the real factors which precluded an immediate recurrence of the difficulty. Under such circumstances it is but sophistry to say the law could be justified constitutionally as a means of meeting the emergency. The most that can be said for the decision, therefore, is that it stated the law in that particular case, but that there is very small likelihood of its application to any wider field. Recent decisions of the Supreme Court have indicated that they propose to limit the rule laid down in it to the narrowest possible range of circumstances.[79]

§ 134. In legislation dealing with emergencies, the line between the valid and the void is by no means sharply drawn. In no line of cases does the judicial process of "exclusion and inclusion"[80] appear more clearly. The court seems to be fully aware of the difficulty involved in making a comprehensive definition which would sharply indicate just what may and what may not be done in this regard. Indeed, this entire development may be said to be the natural fruition of the desire of the court to up-

[78] The law inflicted a penalty upon the railroads should they refuse to accept it, but there was nothing in it to prevent the men from flouting its provisions. Barnes' Fed. Code, Sec. 8093. Even had the law contained a provision binding the brotherhoods, it is difficult to see how it could have been enforced.

[79] This is indicated by the attitude of the court in the Minimum Wage Cases, Adkins v. Children's Hospital, 261 U. S. (1923) 525, 67 L. ed. 785. For an excellent criticism of the reasoning of the majority of the court in this case see, E. C. Corwin "Constitutional Law in 1922-1923" American Political Science Review, Vol. 18 (Feb., 1924) 49-78 at 54-58.

[80] Justice Miller, Davidson v. New Orleans, 96 U. S. (1878) 97, 24 L. ed. 616.

hold a law unless it is clearly void. This same hesitant attitude retarded very materially the development of due process as a police power limitation. It is well that the courts develop new principles slowly, for otherwise they might find themselves in the very embarassing position of being required to overrule a former decision. On the other hand, it may well be questioned if there has not been too great an antipathy to any attempt to blaze new trails.

In view of this attitude of the courts, it may be asked if we may expect further important development in due process as a police power legislation in the near future. It cannot be doubted that there are wide ranges of private rights to which due process might be applied, but the court may prefer to devote itself to the task of establishing more exactly the line of demarcation between valid and invalid exercises of legislative power in the fields already developed. With some sign-posts already placed at most of the cross-roads, it is probable that the beaten path will be followed unless unlooked for contingencies arise.[81] In other words, we may look for a period in which the doctrines of the balance of convenience, administrative efficiency, or public purpose will be more clearly worked out rather than for a period in which there will be any extensive development of new principles.

[81] Collins seems to have misunderstood the methods by which the courts develop legal principles and for that reason failed to see the importance of the Fourteenth Amendment as a constitutional ideal. Fourteenth Amendment and the States, pp. 139-162.

PART EIGHT.

POWER TO ALTER CORPORATE CHARTERS.

CHAPTER XIX.

THE DARTMOUTH COLLEGE CASE AND CORPORATE CHARTERS.

§ 135. The decision of the United States Supreme Court in the case of Dartmouth College v. Woodward,[1] may be characterized as the parent of the provisions which have reserved to the state legislatures the right to alter, amend, or repeal corporate charters. Although there were earlier decisions involving the obligations of contract clause, and one of these applied to vested rights of corporations,[2] it was the Dartmouth College Case which firmly established the view that a charter is a contract, and that accordingly the rights vested under it could not be impaired by the state legislatures. Furthermore, this case gathered up the threads of the earlier decisions and placed the principles upon the firm basis of the obligation of contract clause rather than upon the quicksand of "inherent justice" or "natural rights."[3] In a case of

[1] 4 Wheat. (U. S., 1819) 518, 4 L. ed. 620.

[2] Terrett v. Taylor, 9 Cranch (U. S., 1815) 43, 3 L. ed. 650.

[3] The earlier cases had gone on these grounds as well as the obligation of the contract. Justice Johnson had declared: "I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity." Fletcher v. Peck, 6 Cranch (U. S., 1810) 87 at 143, 3 L. ed. 162. See also Terrett v. Taylor, 9 Cranch (U. S., 1815) 43, 3 L. ed. 650.

this importance, the dramatic setting of the controversy served to emphasize the principle involved.[4]

The decision was greeted as a great victory by those who wished to see the weak protected against the tyrannical actions of the government. Both the public and the legal profession approved it,[5] and honorary degrees were showered upon Webster who had so successfully protected the interests of the college.[6] It soon became evident, however, that the principles as laid down in that decision, were not without danger in that they had a broader implication than was first thought. As a corollary to this decision it would seem that every corporation with a charter from the state was in possession of power which could not be taken from it regardless of the requirements of the public good.

§ 136. Criticism of the decision on the grounds both of its logic and its expediency, increased with the growth of the importance of corporations in the industrial life of the nation. In spite of this criticism its legal authority was not doubted in legal circles. Most of the state courts accepted the rule it established without question, although in Ohio there was a determined attempt about the middle of the century to obtain a general reversal of it.[7] This attempt was unique, however, for even by 1852 it was said that the Dartmouth College Case was "sustained, not

[4] For an excellent study of the obligations of contracts clause during this period in which is given the English common law antecedents of the concept; the views of the framers of the constitution on the meaning of the clause; and a fair but sympathetic evaluation of the Dartmouth College Case, see W. B. Hunting, The Obligation of Contracts Clause of the United States Constitution (Baltimore, 1919).

[5] "Dartmouth College Case," Amer. L. Rev., Vol. VIII (Jan., 1874), pp. 189-239, at 190.

[6] "Dartmouth College Case," Amer. L. Rev., Vol. VIII (Jan., 1874), p. 190.

[7] Debolt v. Ohio Life Ins. & Tr. Co., 1 Ohio St. (1853) 563 (aff'd 16 How. (U. S., 1853) 416, 14 L. ed. 997); Mechanics' & Traders' Bank v. Debolt, 1 Ohio St. (1853) 591 (revsd. 18 How. (U. S., 1855) 380, 15 L. ed. 458); Knoop v. Piqua Branch of State Bank, 1 Ohio St. (1853) 603 (revsd. 16 How. (U. S., 1853) 369, 14 L. ed. 977); Toledo Bank v. Bond, 1 Ohio St. (1853) 672. Even at the present time the Ohio court inclines to limit the application of the Dartmouth College Case. Interurban R. & Ter. Co. v. Public Utils. Commn., 98 Ohio St. (1918) 287, 120 N. E. 831.

by a current, but by a torrent of authorities."[8] Since this period, criticism of the case, and there has been a great deal,[9] has been largely academic.

The decision carried its own cure for the evils inherent in the principles it laid down. In his concurring opinion, Justice Story in three places clearly intimated that, if the legislature were to reserve the right to amend the charter, the principles of the decision would not apply.[10] There had been earlier suggestions of a similar kind. Story himself cited the hint of Chief Justice Parsons in a Massachusetts case covering this point.[11] Much earlier, Madison, in the Constitutional Convention of 1787, had pointed out that the states would try to evade the obligation of contracts clause, although he does not appear to have specified the means.[12]

§ 137. The legislatures, however, were very slow to act upon these suggestions. Only three instances have been discovered earlier than the Dartmouth College case

[8] "That an act of incorporation is a contract between the state and the stockholders is held for settled law by the Federal courts and by every state court in the union. All the cases are saturated with this doctrine. It is sustained, not by a current, but by a torrent of authorities." Justice Black, Bank of Pennsylvania v. Commonwealth, 19 Pa. (1852) 144, 151.

[9] "Dartmouth College Case," Amer. L. Rev., Vol. VIII (Jan., 1874), pp. 189-239; Charles Doe, "New View of the Dartmouth College Case," Harv. L. Rev., Vol. VI (Nov.-Dec., 1892), pp. 161-183, 213-222. A bibliographical note on the more important critics is given in Hunting, Obligations of Contracts Clause, p. 18.

[10] "It is observable, in the first place, that no endowment whatever is given by the crown; and no power is reserved to the crown or government, in any manner to alter, amend, or control the charter." Dartmouth College v. Woodward, 4 Wheat. (U. S., 1819), 518 at 680, 4 L. ed. 620.

"The Rights, legally vested in a corporation, cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation. Wales v. Stetson, 2 Mass. 143, 146," 3 Am. Dec. 39. *Ibid.*, p. 708.

"If the legislature mean to claim such an authority, it must be reserved in the grant. The charter of Dartmouth College contains no such reservation; and I am, therefore, bound to declare that the acts of the legislature of New Hampshire, now in question do impair the obligations of that contract, and are consequently, unconstitutional and void." *Ibid.*, p. 712.

[11] Wales v. Stetson, 2 Mass. (1806) 143 at 146, 3 Am. Dec. 39. Note also the words of Lord Coke, Bagg's Case, 61 Coke (1616) 93, 99a.

[12] D. K. Watson, The Constitution of the United States (Chicago, 1910), Vol. I, p. 776.

in which charters were granted with a repeal clause. The Pennsylvania legislature in the charter of a school at Germantown in 1784, declared that it could be amended only by an act of the legislature, a provision which was subsequently construed as a repeal reservation.[13] The same provision was incorporated in the charter of Jefferson College in 1802.[14] The first bona-fide repeal provision, however, came as a result of the Massachusetts decision. In 1809 the General Court of that state adopted a resolution reserving the power to revoke all charters of manufacturing companies.[15]

Even after the Dartmouth College decision, the states were not quick to act upon the hint of Story. Although the power to amend was reserved in particular charters in a number of instances,[16] there does not seem to have been any law reserving the power generally in all future grants until such a provision was inserted in the New York Constitution of 1826.[17] Gradually the states swung into line. In accordance with the constitutional provision, New York enacted a general repeal provision in 1827, and in this respect was followed by Massachusetts in 1830. Wisconsin inserted such a provision in her constitution in 1848, and California in 1849.[18] Since that time most of the states have reserved this right, either in the general corporation law, or indeed, in most cases, in the constitution.[19] At the present time only Florida, Minnesota, and

[13] Commonwealth v. Bonsall, 3 Whart. (Pa., 1838) 559.

[14] Houston v. Jefferson College, 63 Pa. (1869) 428.

[15] Andrew Allison, "Rise and Probable Decline of Private Corporations in America," American Bar Assn., Reps., Vol. VII (1884), pp. 241-256 at 252.

[16] Rhode Island inserted it in a charter in 1819, Ohio in 1819, and New York in 1822.

[17] The validity of this clause was sustained. McLaren v. Pennington, 1 Paige (N. Y. Ch., 1828) 102.

[18] Allison, "Rise and Probable Decline of Private Corporations," American Bar Assn., Reps., Vol. VII (1844), p. 252.

[19] The following states have constitutional provisions to cover this: Ark., 1874, XII, 6; Ala., 1901, XII, 229; Ariz., 1912, XIV, 2; Cal., 1879, XII, 1; Colo., 1876, XV, 3; Idaho, 1890, XI, 1; Iowa, 1857, VIII, 12; Kans., 1859, XII, 1; La., 1921, XIII, 7; Md., 1867, III, 48; Mass., 1919, 76; Mich., 1908, XII, 1; Miss., 1890, VII, 178; Mont., 1889, XV, 3; Nebr., 1878,

Missouri are without such a provision,[20] and the latter has reserved the right to make police regulations.[21]

These provisions invariably reserve to the legislature the power "to alter, amend, or repeal" corporate privileges or franchises at will.[22] The broad powers which such a provision would seem to give to the legislature were not widely recognized at first. Cooley predicted, with his unerring intuition, that this power would cause no small amount of trouble in the future.[23] A few years later the Supreme Court of the United States found it necessary to lay down the general rule that this power was not entirely unlimited; but the restraints it suggested were left to subsequent decades for development.[24]

XII, 1; Nev., 1864, VIII, 1; N. Mex. 1912, XI, 13; N. Y., 1894, VIII, 1; N. Car., 1876 (amend. 1916), VIII, 1; N. Dak. 1889, VII, 1; Ohio, 1912, XIII, 2; Okla., 1907, IX, 47; Pa., 1873, XVII, 10; S. Car., 1895, IX, 2; S. Dak., 1889, XVII, 9; Tex., 1876, XII, 5; Utah, 1895, XII, 1; Vt., 1913, 65; Va., 1902, XII, 154; Wash., 1889, XII, 1; Wis., 1848, XL, 1; Wyo., 1889, X, 1.

The following have reserved the right to amend corporate charters by general law. Conn., Gen. Stats. (1918) sec. 5465; Del., Rev. Code (1915), sec. 1996; Ga., Civil Code (1911), sec. 2159; Ill., Rev. Stats. (1923), ch. 32, sec. 146; Ind., Burns' Stat. (1926), sec. 5002; Ky., Stats. (1915), sec. 569; Maine, Rev. Stats. (1916), ch. 51, sec. 2; N. H., Pub. Stats. (1901), ch. 148, sec. 19; N. J., Comp. Stats. (1911), p. 1601, sec. 5; Ore., Gen. Laws (1920), sec. 6905; R. I., Gen. Laws (1909), ch. 213, sec. 22; Tenn., Code (1896), sec. 2035; W. Va., Code (1906), sec. 2237.

[20] Horace Stern, "Limitations on the Power of a state under a Reserved Right to Amend or Repeal Charters of Incorporation." Amer. L. Reg., Vol. LIII (XLIV, N. S.) (Jan.-Mar., 1905), pp. 1-169. A list of the state provisions for alteration or repealing charters is to be found *Ibid.*, pp. 160-169. Minnesota had a reserve clause applicable to some kinds of corporations from 1876-1905. See Sess. Laws 1876, ch. 28, sec. 11.

[21] "The exercise of the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the state." Missouri Const., 1875, art. XII, sec. 5. See also Kentucky, 1891, sec. 195.

[22] For example: "Laws relating to corporations may be altered, amended, or repealed at any time, and all corporations doing business in this state may, as to such business, be regulated, limited, and restrained by law." Arizona Const., 1912, art. XIV, sec. 2.

[23] "Respecting the power to amend or repeal corporate grants, some troublesome questions are likely to arise which have only as yet been hinted at in the decided cases." T. M. Cooley, Constitutional Limitations (6th ed., Boston, 1890), p. 336, n. 1.

[24] "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be con-

§ 138. In dealing with the power of the state legislature to alter corporate charters when that right has been reserved, it is important to remember that three distinct contracts are involved. First, there is the charter which represents an agreement between the state and the corporate person. Second, there are the stock contracts between the shareholders and the corporation as an artificial person. Third, there are the contracts which may be entered into between the corporation and outsiders as a result of its ordinary business activities. Each of these types of agreements is protected by the obligation of contracts clause in the Federal Constitution, and the power to alter, amend, or repeal only gives the legislature power to change the first.[25] But, under the power to change the original grant, the courts have held the legislature can make incidental regulations of the relations between the corporation and its stockholders. These may be in the nature of police regulations or merely legislation incidental to the power to regulate the charter. In either case the power is subject to the requirements of due process of law.

§ 139. It not infrequently happens that the charter, due to changed conditions, is inadequate to enable the corporation to carry on the business which it was expected to perform. Alterations which have for their purpose the furtherance of the original aims of the company have

sistent with the scope and object of the act of incorporation. Sheer oppression and wrong can not be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved rights, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolate as in other cases." Justice Swayne, Shields v. Ohio, 95 U. S. (1877) 319 at 325, 24 L. ed. 357.

[25] "The assumption that, because the legislature may destroy a contract by repealing the charter of the corporation which made it, therefore such contract may be impaired, or altered or destroyed, in any manner the legislature may think fit, without repealing the charter, is wholly inadmissible." Justice Curtis, Curran v. Arkansas, 15 How. (U. S., 1853) 304, 14 L. ed. 705. However, the legislature may specify methods of dealing with and collecting debts from defunct incorporations. Read v. Frankfort Bank, 23 Maine (1843) 318.

generally been upheld.[26] As early as 1862, the Iowa court held that the legislature could change the control of a college from the Associated Presbyterian Church to the United Presbyterian Church because the teaching of theology was not a part of the original aim of the institution.[27] When it is desirable from the point of view of the original purpose of the grant, the legislature may give additional privileges to the corporations,[28] may combine,[29]

[26] Poughkeepsie &c. Plank Rd. Co. v. Griffin, 21 Barb. (N. Y., 1856) 454; Sprigg v. Western Tel. Co., 46 Md. (1876) 67.

See also: Assaria State Bank v. Dolley, 219 U. S. (1909) 121, 55 L. ed. 123; White v. Syracuse &c. R. Co., 14 Barb. (N. Y., 1853) 559; Sprigg v. Western Tel. Co., 46 Md. (1877) 67; Ewald v. Medical Soc., 144 App. Div. (1911) 82, 128 N. Y. S. 886; Hollender v. Rochester Food Products Corp., 124 Misc. (1925) 130, 207 N. Y. S. 319.

[27] The purpose of the college was to give a "collegiate education." Had the institution been a theological seminary the case would have been entirely different and the court intimated that under that circumstance its control could not have been shifted. Washington College v Duke, 14 Iowa (1862) 14. Changing the control of a college is not always valid under the reserved power. Allen v. McKean, Fed. Cas. (1833) No. 229, 1 Sumn. 276.

On the power to change control of a college see: Sage v. Dillard, 15 B. Mon. (Ky., 1854) 340; Dart v. Houston, 22 Ga. (1857) 506; Houston v. Jefferson College, 63 Pa. (1869) 428, 437; State v. Knowles, 16 Fla. (1878) 577; Jackson v. Walsh, 75 Md. (1892) 304, 23 Atl. 778; Trapp v. Cook Const. Co., 24 Okla. (1909) 850, 105 Pac. 667; People ex rel. v. Regents, 199 App. Div. (1922) 55, 192 N. Y. S. 108.

[28] Poughkeepsie &c. Plank Rd. Co. v. Griffin, 21 Barb. (N. Y., 1856) 454; Orme v. Salt River Valley Water Users' Assn., 25 Ariz. (1925) 324, 217 Pac. 935.

See also: Bigelow v. Calumet &c. Min. Co., 167 Fed. (1909) 721; Gifford v. New Jersey R. & Transp. Co., 10 N. J. Eq. (1854) 171; Hyatt v. Esmond, 37 Barb. (N. Y., 1862) 601; Zabriskie v. Hackensack & N. Y. R. Co., 18 N. J. Eq. (1867) 178, 90 Am. Dec. 617. Discriminations in the grant of powers are upheld: Bush v. New York Life Ins. Co., 135 App. Div. (1909) 447, 119 N. Y. S. 796.

[29] Pennsylvania College Cases, 13 Wall. (U. S., 1871) 190, 20 L. ed. 550. Although the union was made by common consent in these cases, Justice Clifford intimated that, had the power to amend been reserved, the combination might have been effected even against the will of both corporations if it would have better served the original purpose of the grants. This doctrine has been followed: Market Street R. Co. v. Hellman, 109 Cal. (1895) 571, 42 Pac. 225; McKee v. Chautauqua Assembly, 130 Fed. (1904) 536; Central University v. Walter's Exrs., 28 Ky. L. R. (1906) 1041, 90 S. W. 1066. Where vested rights are seriously disturbed or where the original purpose of the grant is not better served the case is different. Mowrey v. Indianapolis &c. R. Co., Fed. Cas. No. 9,891 (1886); Mills v. Central R. Co., 41 N. J. Eq. (1886) 1, 2 Atl. 453; Ohio ex rel. v. Neff, 52 Ohio St. (1895) 375, 40 N. E. 720. A corporation may be authorized to subscribe to stock in another if it is in accordance

or divide them;[30] may authorize the increase or reduction of the capital stock or bonded indebtedness if vested rights are not impaired.[31] Of course, if the specific amendment

with the original purpose of the company. White v. Syracuse & U. R. Co., 14 Barb. (N. Y., 1853) 559; Bigelow v. Calumet &c. Min. Co., 167 Fed. (1910) 721.

On the general question of the power of the legislature to authorize consolidation of corporations see: Simon Borg & Co. v. New Orleans City R. Co., 244 Fed. (1907) 617; Colgate v. United States Leather Co., 73 N. J. Eq. (1907) 72, 67 Atl. 657; Matter of Consolidated Gas Co., 56 Misc. (1908) 49, 106 N. Y. S. 407; Knapp v. Supreme Commandery, United Order of the Golden Cross of the World, 121 Tenn. (1908) 212, 118 S. W. 390; Mackay v. New York, N. H. &c. R. Co., 82 Conn. (1909) 73, 72 Atl. 583; Colgate v. United States Leather Co., 75 N. J. Eq. (1909) 229, 72 Atl. 126; Gloucester Tpk. Co. v. American Pipe Co., 77 N. J. Eq. (1910) 471, 78 Atl. 708; Winfree v. Riverside Cotton Mills Co., 113 Va. (1912) 717, 75 S. E. 309; Chicago Title & Tr. Co. v. Doyle, 259 Ill. (1913) 489, 102 N. E. 790; American Malt Corp. v. Board of Public Utl. Commrs., 86 N. J. L. (1914) 668, 92 Atl. 362; Copeland v. United Shoe Mach. Co., 84 N. J. Eq. (1915) 276, 94 Atl. 404; In re Young Women's Assn., 169 App. Div. (1915) 734, 155 N. Y. S. 838; Jones v. Rhea, 130 Va. (1921) 345, 107 S. E. 814; In re Union Food Stores, 3 Fed. (2d) (1925) 736. *Contra:* Black v. Delaware &c. Canal Co., 24 N. J. Eq. (1873) 455; Mills v. Central R. Co., 41 N. J. Eq. (1886) 1, 2 Atl. 453.

[30] Covington & L. Tpk. Rd. Co. v. Sandford, 164 U. S. (1896) 578, 41 L. ed. 560; Troy &c. R. Co. v. Kerr, 17 Barb. (N. Y., 1854) 581.

[31] Wright v. Barnard, 248 Fed. (1817) 756; C. H. Venner v. United States Steel Corp., 116 Fed. (1902) 1012; Joslyn v. Pacific Mail S. S. Co., 12 Abbott Pr. (N. S.) (N. Y., 1872) 329; Martin v. Remington-Martin Co., 95 App. Div. (1904) 18, 88 N. Y. S. 573; Hinckley v. Schwarz-Schild & Sulzberger Co., 107 App. Div. (1905) 470, 95 N. Y. S. 537. On the question of legislative increase of capital stock see. Fishback v. Fond Du Lac &c. R. Co., 158 Fed. (1907) 88; Vanceburg &c. Tpk. Road Co. v. Chesapeake &c. R. Co., 280 Fed. (1922) 482; Kent v. Quicksilver Min. Co., 78 N. Y. (1879) 159 at 182; Palliser v. Home Tel. Co., 152 Ala. (1907) 440, 44 So. 575; Einstein v. Raritan Woolen Mills, 74 N. J. Eq. (1908) 624, 70 Atl. 295; State v. Railroad Commn., 137 Wis. (1908) 80, 117 N. W. 846; Foote v. Greilick, 166 Mich. (1911) 636, 132 N. W. 473; Steele v. Hughes, 104 Ark. (1912) 517, 149 S. W. 336; Fall River Gas Works v. Board of Gas & Light Commrs., 214 Mass. (1913) 529, 102 N. W. 475; Commonwealth v. United States Worsted Co., 220 Mass. (1913) 183, 107 N. E. 910; State v. Northern Pac. R. Co., 157 Wis. (1914) 73, 147 N. W. 219; Kimmel v. Gray, 196 Ill. App. (1917) 406; Venner v. Michigan R. Commn., 205 Mich. (1919) 573, 172 N. W. 567; In re Fryeburg Water Co., 79 N. H. (1919) 123, 106 Atl. 225; Venner v. American Tel. & Tel. Co., 110 Misc. (1920) 118, 181 N. Y. S. 45; Randle v. Winona Coal Co., 206 Ala. (1921) 254, 89 So. 790; State ex rel. v. Urschel, 104 Ohio St. (1922) 172, 135 N. E. 630.

On the question of legislative change of bonded indebtedness see: Calder v. Michigan ex rel., 218 U. S. (1910) 591, 54 L. ed. 1163; see also: Macon &c. R. Co. v. Gibson, 85 Ga. (1890) 1, 11 S. E. 442, 21 Am. St. 135.

The same principles apply in cases of a change from par to non-par value capitalization. Whitman v. Consolidated Gas, E. L. & P. Co., 129 Atl. (Md., 1925) 22.

was anticipated in the original charter, the case is strengthened, and the legislature may make still further alterations in the charter, as for example mutualizing an insurance company.[32] Nor does the power to make such amendments lapse with the transfer of the corporate rights to another corporation,[33] and, in general, the legislature has, in this respect, a somewhat wider power than the police power, being limited only by the fundamental object of the original grant.[34]

§ 140. It frequently happens that the legislature finds it necessary to step in to protect the stockholders from mismanagement on the part of those in control of the corporation, or to secure the rights of the minority.[35] Of

32 Legislation to remove a technical difficulty in the way of effecting this is valid. Lord v. Equitable Life Assur. Soc., 194 N. Y. (1909) 212, 87 N. E. 443; Polk v. Mutual R. F. L. Assn., 207 U. S. (1907) 310, 52 L. ed. 222. The legislature may authorize the company to demutualize with the consent of three-fourths of the directors and the superintendent of insurance. Grobe v. Erie Co. Mut. Ins. Co., 39 App. Div. (1902) 183, 57 N. Y. S. 290.

33 "The question before us is whether an amendment to the act, purely administrative in the character of the burdens imposed, aimed to promote the public interest and welfare, enacted while the title to the property remained in the original company, a corporation chartered by congress, which preserved intact all the pecuniary rights of the company, and whose privileges are accepted and acted upon by the company, is denuded of vitality by a sale to a new company under a foreclosure of a mortgage executed prior to such legislation. That question must be answered in the negative." Union Pac. R. Co. v. Mason City &c. F. R. Co., 199 U. S. (1905) 160 at 169, 50 L. ed. 134; Marion Tp. Gravel Rd. Co. v. Sleeth, 53 Ind. (1876) 35.

34 Even a statute prohibiting the teaching of white and colored pupils in the same school rooms is valid as an exercise of the reserved power to amend the charter though the institution may have been in the habit of conducting mixed classes. Berea College v. Kentucky, 211 U. S. (1908) 45, 53 L. ed. 81. But under the repeal power the legislature can not authorize a majority of the stockholders to turn the company from a private to a public one for this is a change in its fundamental nature. People ex rel. v. Public Serv. Commrs., 226 N. Y. (1919) 527, 124 N. E. 105.

The courts, however, tend to construe the original purposes of the grant strictly. Oldtown &c. R. Co. v. Veazie, 39 Maine (1885) 571, 581; Kent v. Quicksilver Min. Co., 78 N. Y. (1879) 159; Boca Mill Co. v. Curry, 154 Cal. (1908) 326, 97 Pac. 1117; Atlanta Steel Co. v. Mynahan, 138 Ga. (1912) 668, 75 S. E. 980.

35 Payment of dividends from capital stock rather than from earnings has been held sufficient warrant for revoking a corporate charter. State ex rel. v. Brictson Mfg. Co., 205 N. W. (Nebr., 1925) 246.

such nature are acts protecting the vested interests of purchasers of cemetery lots,[36] those preventing the corporation from speculating in land,[37] and those changing representation on the board of directors to conform to the proportion of stock actually paid for.[38] Likewise the corporation itself can be forced to utilize the privileges granted and be prohibited from leasing them to others.[39] This group of powers, however, seems never to have been exercised in any manner other than in making recognized police regulations.

The legislation providing for cumulative voting presents a somewhat different aspect. Unless the power to amend the charter has been reserved, a law imposing cumulative voting on the corporation impairs the obligation of contract.[40] But if this power has been reserved, a retroactive cumulative voting law is a valid attempt to protect the rights of the minority stockholders.[41] A few

[36] Upheld: Close v. Glenwood Cemetery, 107 U. S. (1883) 466, 27 L. ed. 408. But see Ritter v Bausman, 2 Woodw. Dec (Pa., 1869) 248

[37] Louisville Bank Co. v. Commonwealth, 142 Ky. (1911) 690, 134 S. W. 1142; Dahlgard v. Florida Dev. Corp., 187 Ill. App (1914) 282

[38] The city of Rochester subscribed for three-eighths of the stock of a railroad corporation and paid for it in full. The private subscribers only paid part of their subscriptions and the legislature therefore provided that the city should elect seven-thirteenths of the directors Under the rights to amend the charter this was upheld "Power to legislate, founded upon such a reservation in a charter to a private corporation, is certainly not without limit, and it may well be admitted that it can not be exercised to take away or destroy rights acquired by virtue of such a charter, and which by a legitimate use of the powers granted have become vested in the corporation, but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant or to secure the due administration of its affairs." Justice Clifford, Miller v State, 15 Wall. (U. S, 1872) 478 at 498, 21 L. ed. 98. Compare the statement of Justice Rosekrans, Hyatt v. McMahon, 25 Barb. (N. Y., 1857) 457 at 468. See also Massachusetts General Hospital v. State Mut. Life Assur. Co., 4 Gray (Mass., 1855) 227.

[39] United States v. Union Pac. R. Co., 160 U. S. (1895) 1, 40 L. ed 319. So also the repeal power can be used to prevent a banking corporation from acquiring and holding land for speculative purposes not connected with the regular banking business. Louisville Banking Co. v. Commonwealth, 142 Ky. (1911) 690, 134 S W. 1142.

[40] Hays v. Commonwealth, 82 Pa. (1876) 518; State v. Greer, 78 Mo. (1883) 188; In re Baker's Appeal, 109 Pa. (1885) 461; Smith v. Atchison T. &c. R. Co., 64 Fed. (1894) 272.

[41] In re Baker's Appeal, 109 Pa. (1885) 461; Attorney General v. Looker, 111 Mich. (1897) 498, 69 N. W. 929; Cross v. West Virginia, &c.

states, most conspicuously New Jersey, have held such an act to be beyond the power of the legislature, even with the reserved right of amendment. If it be granted that the right to elect directors is a vested property right, and if the right to alter applies only to matters of public concern, the reasoning of the New Jersey court seems conclusive.[42] The second premise has, however, been distinctly rejected by the Federal Supreme Court in upholding a statute providing for cumulative voting. Justice Gray pointed out that the very purpose of reserving the right to amend the charter was to obviate the effect of the Dartmouth College decision, which involved the power of the legislature to change the right to choose directors. He concluded, therefore, that as far as those rights were concerned, the reservation of that power enabled the legislature to protect minority rights by a method of cumulative voting.[43] The logic of this argument is undoubtedly sound, but in one respect it leaves an unsatisfactory impression, for one might infer that the power of the legislature to control the corporation is well nigh complete. This is not the case.

R. Co., 35 W. Va. (1891) 174, 12 S. E. 1071; Bond v. Atlantic Terra Cotta Co., 137 App. Div. (1910) 671, 122 N. Y. S. 425; Gregg v. Granby Mining & S. Co., 164 Mo. (1901) 616, 65 S. W. 312; Looker v. Maynard, 179 U. S. (1900) 46, 45 L. ed. 79.

It has been held that although the legislature can take the voting rights from holders of preferred stock they can not impair their dividends. Millspaugh v. Cassedy, 191 App. Div. (1920) 221, 181 N. Y. S. 276; Matter of Horace Keane Aeroplanes, 194 App. Div. (1921) 873, 185 N. Y. S. 163; Morris v. American Pub. Utils. Co., 122 Atl. (Dela. Ch., 1923) 696. But see Einstein v. Raritan Woolen Mills, 74 N. J. Eq. (1908) 624, 70 Atl. 295. The repeal power gives the legislature no power to make assessable stock which was formerly non-assessable. Garey v. St. Joe Min. Co., 32 Utah (1907) 497, 91 Pac. 369. *Contra:* Somerville v. St. Louis Min. & Mill Co., 46 Mont. (1912) 268, 127 Pac. 464.

[42] "The power reserved by the legislature in the Act of 1846 to alter, suspend and repeal relates to those matters which concern the public, and not to the mode of controlling the affairs of the stockholders *inter esse*. . . .

"The method of voting prescribed in the charter is part of the contract between stockholders. . . . It in nowise affects the public, and it is a contract which can not be impaired by legislation." Justice Van Syckel, In re Newark Library Assn., 64 N. J. L. (1899) 217 at 219, 43 Atl. 435. See also Loewenthal v. Rubber Reclaiming Co., 52 N. J. Eq. (1894) 440, 28 Atl. 454; Bailey v. Power Street M. E. Church, 6 R. I. (1860) 491; Avondale Land Co. v. Shook, 170 Ala. (1911) 379, 54 So. 268.

[43] Looker v. Maynard ex rel., 179 U. S. (1900) 46, 45 L. ed. 79.

§ 141. It is well recognized that the legislature cannot force the corporation to assume entirely new functions under the guise of amending its charter.[44] This rule was applied in Georgia as early as 1852,[45] and by the New York court two years later. In the second case the court sustained a law authorizing a railroad company to operate but half their road on the ground that the function of the corporation had not been changed.[46] Amendments changing the principal place of business of a corporation, changing the destination of a railroad, authorizing it to double its mileage and indebtedness, or even build branch lines are considered fundamental changes by many courts,[47] although not by all.[48]

[44] May v. Memphis Branch R. Co., 48 Ga. (1873) 109; People ex rel. v. Public Service Commn., 226 N. Y. (1919) 527, 124 N. E. 105; Sprigg v. Western Tel. Co., 40 Md. (1870) 67; Shields v. Ohio, 95 U. S. (1877) 319 at 324, 24 L. ed. 357; Shiflett v. John W. Kelly & Co., 10 Ga. App. (1915) 91, 84 S. E. 606; People ex rel. v. Public Serv. Commn., 226 N. Y. (1919) 527, 124 N. E. 105; Matter of Lithuanian Workers' Literature Soc., 196 App. Div. (1921) 262, 187 N. Y. S. 612.

[45] Winter v. Muscogee R. Co., 11 Ga. (1852) 438.

[46] "It does not follow that stockholders are obliged to accept every amendment, however complete and fundamental. . . . The legislature may repeal and also amend the charter of a railroad corporation; but if the amendment go farther than matters of police and those duties that immediately affect the public, I think there is no compulsory power, and the corporation may decline to accept." As an example, Justice Hand declared the railroad could not be compelled to conduct a brewery. Troy & R. Co. v. Kerr, 17 Barb. (N. Y., 1854) 581 at 603. See also Allen v. Ajax Min. Co., 30 Mont. (1904) 490, 77 Pac. 47; Hyatt v. Whipple, 37 Barb. (N. Y., 1862) 595; Atchison, T. & S. F. R. Co. v. Fletcher, 35 Kans. (1886) 236.

[47] "If the change in the act is simply offering the corporation the privilege of entering upon another and a different enterprise it is not within the condition of the subscription." Chancellor Zabriskie, Zabriskie v. Hackensack &c. R. Co., 18 N. J. Eq. (1867) 178 at 187, 90 Am. Dec. 617. Kenosha R. &c. R. Co. v. Marsh, 17 Wis. (1863) 13; Snook v. Georgia Imp. Co., 83 Ga. (1889) 61, 9 S. E. 1104; Alexander v. Atlanta &c. R. Co., 108 Ga. (1889) 151, 33 S. E. 809; Bernstein v. Kaplan, 150 Ala. (1907) 222, 43 So. 581; Bryan v. Board of Education., 90 Ky. (1890) 322, 12 Ky. L. 12, 13 S. W. 276; Atchison, T. &c. R. Co. v. Fletcher, 35 Kans. (1886) 236; Missouri Pac. R. Co. v. Nebraska, 217 U. S. (1910) 196, 54 L. ed. 727; Washington v. Fairchild, 224 U. S. (1912) 510, 56 L. ed. 863.

[48] Buffalo &c. R. Co. v. Dudley, 14 N. Y. (1856) 336; Schenectady &c. Rd. Co. v. Thatcher, 11 N. Y. (1854) 108; Durfee v. Old Colony & Fall River R. Co., 5 Allen (Mass., 1862) 230; Bond v. Atlantic Terre Cotta Co., 137 App. Div. (1910) 671, 122 N. Y. S. 425; State v. Clement Nat. Bank, 84 Vt. (1913) 167, 78 Atl. 944; Perkins v. Coffin, 84 Conn. (1911) 275, 79 Atl. 1070. Ann. Cas. 1918C, 1188; People ex rel. v. State Board of Tax Commrs., 179 App. Div. (1917) 489, 165 N. Y. S. 970.

There is likewise a close relationship between legislative imposition of extended powers on a corporation and the interest of the public. When there is an obvious public advantage to be served the legislature has greater powers in this regard, than if this is not the case. The duties of a medical society for example, may be extended while those of other incorporated bodies may not.[49] Likewise, when a corporation is formed for a certain purpose, the legislature may not subsequently permit two-thirds of the stockholders to lease the property to a corporation of another character, if there is no public benefit.[50] *Vice versa*, since the public does have an interest in the operation of telegraph lines by the owners a statute to enforce this is valid.[51] Even in those cases where it has been said that the public welfare justified the imposition of the new duty, there seems to be no doubt that the corporation could give up its charter should it not consent to the amendment, and cease business. The state cannot force it to continue operation and at the same time to assume new functions.[52] Under such circumstances subscriptions for stock cannot be enforced.[53] It is to be

[49] Ewald v. Medical Soc., 144 App. Div. (1911) 82, 128 N. Y. S. 886. Cf., Hollender v. Rochester Food Products Corp., 124 Misc. (1925) 130, 207 N. Y. S. 319.

[50] Dow v. Northern Railroad, 67 N. H. (1887) 1, 37 Atl. 510. But see People ex rel. v. Public Serv. Commrs., 226 N. Y. (1919) 527, 124 N. E. 105.

[51] United States v. Union Pac. R. Co., 160 U. S. (1895) 1, 40 L. ed. 319. Other cases where regulations for the public benefit were upheld are: Atlantic Coast Line R. Co. v. North Carolina Corp. Commn., 206 U. S. (1904) 1, 51 L. ed. 933; Fair Haven &c. R. Co. v. New Haven, 203 U. S. (1906) 379, 51 L. ed. 237; People v. Illinois Cent. R. Co., 235 Ill. (1908) 374, 85 N. E. 606, 18 L. R. A. (N. S.) 915; State v. Louisville &c. R. Co., 63 Fla. (1912) 274, 57 So. 673. See also ch. XX.

[52] Kenosha R. &c. R. Co. v. Marsh, 17 Wis. (1863) 13; Yeaton v. Bank of the Old Dominion, 21 Grat. (Va., 1872) 593; Bailey v. New York, 3 Hill (N. Y., 1842) 531, 38 Am. Dec. 669; In re College Hill Land Assn., 157 Cal. (1910) 596, 108 Pac. 681.

[53] "The charter of a corporation is a contract of a dual character; first, a contract between the state which grants the charter and the corporation; and secondly, a contract between the corporation and its members; and while the state if it reserves the power to do so, can alter and amend the charter, and the corporation itself can not object to the alteration or amendment, yet the state has no power to make any material or essential alteration in the contract between the members themselves and the cor-

noted, however, that under the dual contract theory even amendments for the public interest can hardly go further than would be warranted under the police power. In this respect, then, the legislature seems to be more limited in increasing the powers of the corporation for the public benefit than it is in making alterations for the interests of the stockholders. In the latter case, especially in the matter of imposing cumulative voting, the reserved right to amend the grant gives the state some additional power.

§ 142. As early as 1812 the United States Supreme Court decided that an exemption from taxation in return for a valuable consideration formed a valid contract, and was therefore protected by the obligation of contract clause.[54] In spite of the remonstrances of the state courts, this doctrine came to be generally accepted even before the Civil War.[55] After the adoption of the Fourteenth Amendment, however, the question arose again whether the legislature, under the power to amend the charter, could levy a license fee or revoke a tax exemption.

If the state has absolute proprietary control over the corporation, little difficulty arises. Those corporations which are not engaged in interstate commerce can, of course, be arbitrarily excluded from the state.[56] For this

poration." When this is done contracts for subscriptions to stock can not be enforced. Justice Simmons, Snook v. Georgia Imp. Co., 83 Ga. (1899) 61, 9 S. E. 1104; Oldtown &c. R. Co. v. Veazie, 39 Maine (1855) 571, 581.

[54] New Jersey v. Wilson, 7 Cranch (U. S., 1812) 164 at 167, 3 L. ed. 303. Of course if taxation is not provided for in the charter the corporations can be taxed on its capital stock. Providence Bank v. Billings, 4 Pet. (U. S., 1830) 514, 7 L. ed. 939.

[55] Cooley, Constitutional Limitations, pp. 336-338.

[56] Bank of Augusta v. Earle, 13 Pet. (U. S., 1839) 519, 10 L. ed. 274. The state can not exclude corporations engaged in interstate commerce or those in the employ of the general government. Horn Silver Min. Co. v. New York, 143 U. S. (1892) 305, 36 L. ed. 164.

On the power of a state to exclude foreign corporations see: Paul v. Virginia, 8 Wall. (U. S., 1868) 179, 181, 19 L. ed. 448; Western Turf Assn. v. Greenberg, 204 U. S. (1907) 359, 51 L. ed. 520; Selover, Bates & Co. v. Walsh, 226 U. S. (1912) 112, 57 L. ed. 146; Seaboard Air Line R. Co. v. Railroad Commn., 155 Fed. (1907) 792; King Tonopah Min. Co. v. Lynch, 232 Fed. (1916) 485; Matthews v. Theological Seminary, 2 Brewst. (Pa., 1868) 541; State Treasurer v. Auditor General, 46 Mich. (1881) 224, 9 N. W. 258; Pierce v. People, 106 Ill. (1883) 11, 46 Am. Rep.

reason the state governments may impose such conditions as they choose on the admission of foreign insurance corporations to the privileges of doing business within their jurisdiction.[57] One of these conditions may be a license

683; Huffman v. Western Mtg. & Inv. Co., 13 Tex. Civ. App. (1896) 160, 36 S. W. 306; New York Mtg. Co. v. Secretary of State, 150 Mich. (1907) 197, 114 N. W. 82; Herman Bros. Co. v. Nasiacos, 46 Colo. (1909) 208, 103 Pac. 301; Reed v. Todd, 25 S. Dak. (1910) 421, 127 N. W. 527; H. K. Mulford Co. v. Curry, 163 Cal. (1912) 276, 125 Pac. 236; American Fidelity Co. v. Bleakley, 157 Iowa (1912) 442, 138 N. W. 508; S. S. White Dental Mfg. Co. v. Commonwealth, 212 Mass. (1912) 35, 98 N. E. 1056, Ann. Cas. 1913C, 805; Frink v. Nat. Mut. Fire Ins. Co., 90 S. Car. (1912) 544, 74 S. E. 33, Ann. Cas. 1913D, 221; State v. Hodges, 114 Ark. (1914) 155, 169 S. W. 942, L. R. A. 1916F, 122; State ex rel. v. Roach, 267 Mo. (1916) 300, 184 S. W. 969; Republic Power & Ser. Co. v. Gus Blass Co., 263 S. W. (Ark., 1924) 785; State v. K. K. K., 117 Kans. (1925) 564, 232 Pac. 254; State ex rel. v. Crawford, 105 So. (Fla., 1925) 446. This is of course not true of corporations engaged in interstate commerce. See in this regard the illuminating discussion in W. Thompson, Federal Centralization (N. Y., 1923), 255-262.

[57] Home Ins. Co. v. Morse, 20 Wall. (U. S., 1874) 445, 22 L. ed. 365; Doyle v. Continental Ins. Co., 94 U. S. (1876) 535, 24 L. ed. 148; Paul v. Virginia, 8 Wall. (U. S., 1869) 168, 19 L. ed. 357; Blake v. McClung, 172 U. S. (1898) 239, 43 L. ed. 432; Hooper v. California, 155 U. S. (1895) 648, 39 L. ed. 297; Allgeyer v. Louisiana, 165 U. S. (1897) 578, 41 L. ed. 832; Orient Ins. Co. v. Daggs, 172 U. S. (1899) 557, 43 L. ed. 552; New York Life Ins. Co. v. Cravens, 178 U. S. (1900) 389, 44 L. ed. 1116; Lafayette Ins. Co. v. French, 18 How. (U. S., 1855) 404, 15 L. ed. 451. See also: Blake v. McClung, 172 U. S. (1898) 239, 43 L. ed. 432; Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. (1899) 602, 43 L. ed. 569; Wilson-Moline Buggy Co. v. Hawkins, 223 U. S. (1909) 713, 56 L. ed. 625; International Text Book Co. v. Lynch, 218 U. S. (1910) 664, 54 L. ed. 1201; Standard Oil Co. v. Missouri ex rel., 224 U. S. (1912) 270, 56 L. ed. 760; New York L. Ins. Co. v. Deer Lodge County, 231 U. S. (1913) 495, 58 L. ed. 332; Interstate Amusement Co. v. Albert, 239 U. S. (1916) 560, 60 L. ed. 439; International Paper Co. v. Massachusetts, 246 U. S. (1918) 135, 62 L. ed. 624; Lamb v. Lamb, Fed. Cas. No. 8018 (1875); Oregonian R. Co. v. Oregon R. & Nav. Co., 27 Fed. (1886) 277; Manchester Fire Ins. Co. v. Herriott, 91 Fed. (1899) 711; Baldwin Tool Works v. Blue, 240 Fed. (1917) 202; O'Brien v. Southern Bell Tel. & Tel. Co., 292 Fed. (1923) 379; Slaughter v. Commonwealth, 13 Grat. (Va., 1856) 767; Fire Dept. of Milwaukee v. Helfenstein, 16 Wis. (1862) 136; People ex rel. v. Judge of Jackson Circuit Court, 21 Mich. (1870) 577; Utley v. Clark-Gardner Lode Min. Co., 4 Colo. (1878) 369; Western Union Tel. Co. v. Mayer, 28 Ohio St. (1876) 521; People v. Fire Assn., 92 N. Y. (1883) 311, 44 Am. Rep. 380; Lycoming Fire Ins. Co. v. Wright, 55 Vt. (1883) 526; State v. Insurance Co. of N. A., 115 Ind. (1888) 257, 17 N. E. 574; Ehrhardt v. Robertson Bros., 78 Mo. App. (1899) 404; Woodson v. State, 69 Ark. (1900) 521, 65 S. W. 465; People's Bldg., L. & Sav. Assn. v. Markley, 27 Ind. App. (1901) 128, 60 N. E. 1013; Tolerton & Stetson Co. v. Ferguson, 84 Minn. (1901) 497, 88 N. W. 19; State v. Fleming, 70 Nebr. (1903) 523, 529, 97 N. W. 1063; Attorney General v. Electric Stor. Bat. Co., 188 Mass. (1905) 239, 74 N. E. 467; State v. Standard Oil Co.,

fee, which not only may discriminate against foreign corporations,[58] but, it has been said, may be changed arbi-

194 Mo. (1906) 124, 91 S. W. 1062; Booth & Co. v. Weigand, 30 Utah (1906) 135, 83 Pac. 734; International Trust Co. v. A. Leschen &c. Rope Co., 41 Colo. (1907) 299, 92 Pac. 727; Mutual Life Ins. Co. v. Mullen, 107 Md. (1908) 457, 69 Atl. 385; Loverin & Browne Co. v. Travis, 135 Wis. (1908) 322, 115 N. E. 829; New York Life Ins. Co. v. Bradley, 83 S. Car. (1909) 418, 65 S. E. 433; Ulmer v. First Nat. Bank, 61 Fla. (1911) 460, 55 So. 405; Queen City Fire Ins. Co. v. Basford, 27 S. Dak. (1911) 164, 130 N. W. 44; Independent Tug Line v. Lake Superior Lumber &c. Co., 146 Wis. (1911) 121, 131 N. W. 408; State ex rel. v. Blake, 241 Mo. (1912) 100, 144 S. W. 1094; Brown-Ketcham Iron Works v. George B. Swift Co., 53 Ind. App. (1913) 630, 100 N. E. 584; State ex rel. v. Alderson, 49 Mont. (1914) 29, 140 Pac. 82; Pierce Oil Corp. v. Weinert, 106 Tex. (1914) 435, 167 S. W. 808; National Mercantile Co. v. Mattson, 45 Utah (1914) 155, 143 Pac. 223; German American Coffee Co. v. Diehl, 216 N. Y. (1915) 57, 109 N. E. 875; Armour Pack. Co. v. Vinegar Bend Lumber Co., 149 Ala. (1916) 205, 42 So. 866; Joseph T. Ryerson & Son v. Shaw, 277 Ill. (1917) 524, 115 N. E. 650; Bondurant v. Dahnke-Walker Mill. Co., 175 Ky. (1917) 774, 195 S. W. 139; Lukens v. International Life Ins. Co., 269 Mo. (1917) 574, 191 S. W. 418; Thompson v. Meridian Life Ins. Co., 38 S. Dak. (1917) 570, 162 N. W. 573; Collector of Taxes v. Rising Sun Street Lighting Co., 229 Mass. (1918) 494, 118 N. E. 871; Fidelity & Deposit Co. v. Brown, 92 Vt. (1918) 390, 104 Atl. 234; Indiana Harbor Belt R. Co. v. Green, 289 Ill. (1919) 81, 124 N. E. 298; Sukosky v. Philadelphia &c. Coal &c. Co., 189 App. Div. (1919) 689, 179 N. Y. S. 23; Kluver v. Middlewest Grain Co., 44 N. Dak. (1919) 210, 173 N. W. 468; Major Creek Lumber Co. v. Johnson, 99 Ore. (1921) 172, 195 Pac. 177; Hanover Fire Ins. Co. v. Carr, 317 Ill. (1925) 366, 148 N. E. 23. So also a confiscatory tax may be imposed on the local business of an interstate company if it is free to cease doing local business. Pullman Co. v. Adams, 189 U. S. (1903) 420, 47 L. ed. 877.

[58] Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S., 1870) 566, 19 L. ed. 1029. See also: Board of Educ. of Ky. Ann. Conf. v. Illinois, 203 U. S. (1906) 553, 51 L. ed. 314; Central of Georgia R. Co. v. Wright, 207 U. S. (1907) 127, 52 L. ed. 134; Louisville &c. R. Co. v. Gaston, 216 U. S. (1909) 418, 54 L. ed. 542; International Text Book Co. v. Peterson, 218 U. S. (1910) 664, 54 L. ed. 1201; Baltic Min. Co. v. Commonwealth, 231 U. S. (1913) 68, 58 L. ed. 127; Dalton Adding Machine Co. v. State Corp. Commn. of Va., 236 U. S. (1915) 699, 59 L. ed. 797; Cheney Bros. Co. v. Massachusetts, 246 U. S. (1918) 147, 62 L. ed. 632; Insurance Co. of N. A. v. New Orleans, Fed. Cas. No. 7052 (1870); Crane Co. v. Looney, 218 Fed. (1914) 260; Air-Way Electric Appliance Corp. v. Archer, 279 Fed. (1922) 878; Commonwealth v. Milton, 51 Ky. (1851) 212, 54 Am. Dec. 522; State v. Lathrop, 10 La. Ann. (1855) 398; Attorney-General v. Bay State Min. Co., 99 Mass. (1868) 148, 96 Am. Dec. 717; Phoenix Ins. Co. v. Commonwealth, 68 Ky. (1869) 68, 96 Am. Dec. 331; Western Union Tel. Co. v. Lieb, 76 Ill. (1875) 172; Ex parte Cohn, 13 Nev. (1878) 424; Hughes v. Cairo, 92 Ill. (1879) 339; Home Ins. Co. v. Swigert, 104 Ill. (1882) 653; People v. Equitable Tr. Co., 96 N. Y. (1884) 387; Hartford Fire Ins. Co. v. Raymond, 70 Mich. (1888) 485, 489, 38 N. W. 474; Noble v. Mitchell, 100 Ala. (1893) 519, 14 So. 581; Williams v. Mutual Reserve Fund Life Assn., 145 N. Car. (1907) 128, 58 S. E. 802; Southern R. Co. v. Greene, 160 Ala. (1910) 396, 49 So. 404; State v. Illinois

trarily at the whim of the legislature.[59] It is obvious that this power might be used to work grave injustice, and in 1886 Justice Harlan, in a strong dissent, pointed out that to allow the legislature to impose any burden it might wish on a particular corporation as a prerequisite of doing further business might deprive it of the equal protection of the law.[60]

Cent. R. Co., 246 Ill. (1910) 188, 92 N. E. 814; State v. McMaster, 84 S. Car. (1910) 495, 66 S. E. 877; Weiss v. Stubblefield, 85 Kans. (1911) 199; Montgomery v. Royal Exch. Assur. Corp., 5 Ala. App (1912) 318, 59 So. 508; Hirschfeld v. McCullagh, 64 Ore. (1913) 502, 127 Pac. 541; State v. Leuch, 156 Wis. (1913) 121, 144 N. W. 290; Hunter v. Wells Fargo Exp. Co., 134 La. (1914) 358, 64 So. 139; Atlas Powder Co. v. Goodloe, 131 Tenn. (1915) 490, 175 S. W. 547; Northwestern Mut. Ins. Co. v. State, 163 Wis. (1915) 484, 155 N. W. 609; Citizens Ins. Co. v. Hebert, 139 La. (1916) 708, 71 So. 955; State v. Agey, 171 N. Car. (1916) 831, 88 S. E. 726; Pittsburg Life & Tr. Co. v. Young, 172 N. Car. (1916) 470, 90 S. E. 568; Equitable Life Assur. Co. v. Hart, 55 Mont. (1918) 76, 173 Pac. 1062; Lorrilard Co. v. Scott, 184 Ky. (1919) 312, 212 S. W. 145; State v. St. Louis Cotton Compress Co., 147 Ark. (1921) 406, 227 S. W. 605; State ex rel. v. Gehrz, 181 Wis. (1923) 238, 194 N. W. 418; Barron G. Collier, Inc. v. American Cafeteria, 215 Mo. App. (1924) 182, 256 S. W. 118; State v. Freehold Inv. Co., 305 Mo. (1924) 88, 264 S. W. 702; In re Buckhannon River Coal Co., 202 N. W. (Nebr., 1925) 616.

[59] "The state, having the power to exclude entirely has the power to change the conditions of admission at any time for the future and to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the State or within its jurisdiction. It is outside, at the threshold, seeking admission with consent not yet given." Justice Blatchford, Philadelphia Fire Assn. v. New York, 119 U. S. (1886) 110 at 119, 30 L. ed. 342.

See also, Ducat v. Chicago, 10 Wall. (U. S., 1870) 410, 19 L. ed. 972.

On the general power of the legislature to arbitrarily change the corporation laws see: Cheney Bros. Co. v. Massachusetts, 246 U. S. (1918) 147, 62 L. ed. 632; Western Union Tel. Co. v. Frear, 216 Fed. (1914) 199; King Tonopah Min. Co. v. Lynch, 232 Fed. (1916) 485; Phoenix Assur. Co. v. Ludwig, 87 Ark. (1908) 465, 113 S. W. 34; Kiesel v. Bybee, 14 Idaho (1908) 670, 95 Pac. 20; Daniels v. Detroit, G. H. &c. R. Co., 163 Mich. (1910) 468, 128 N. W. 797; White Sewing-Machine Co. v. Harris, 252 Ill. (1911) 361, 96 N. E. 857; State v. American Surety Co., 91 Nebr. (1912) 22, 135 N. W. 365; Marconi Wireless Tel. Co. v. Commonwealth, 218 Mass. (1914) 558, 106 N. E. 310; State v. American Sugar Refin. Co., 138 La. (1916) 1005, 71 So. 137; State v. Creamery Pkg. Mfg. Co., 110 Minn. (1916) 415, 126 N. W. 126, 623; State ex rel. v. Crescent Cotton Oil Co., 116 Miss. (1918) 398, 77 So. 185.

[60] Fire Assn. of Phila. v. New York, 119 U. S. (1886) 110, 30 L. ed. 342. This was implied in the opinion in Bush v. New York Life Ins. Co., 135 App. Div. (1909) 447, 119 N. Y. S. 796.

See also: Donald v. Philadelphia &c. Coal &c. Co., 241 U. S. (1916) 329, 60 L. ed. 1027; Leonard v. American Life & A. Co., 139 Ga. (1913)

The state also has an absolute proprietary control in the matter of forming corporations and hence can impose any license fee it may see fit before allowing the company to begin business,[61] or before giving it additional favors.[62] But it is another question if the legislature, under the power to amend the charter, could impose special license fees on corporations to the extent which those fees could be imposed before granting it a charter. In 1887 the imposition of such a fee to pay the costs of the railroad com-

274, 77 S. E. 41. "The mere number of authorized non-par value shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of such annual fees. Such a classification is not based on anything having relation to the purpose for which it is made." Justice Butler in Air-Way Elec. Appliance Corp. v. Day, 266 U. S. (1924) 71 at 85, 69 L. ed. 178. But the legislature has a wide scope of latitude in classification of insurance companies. Northwestern Nat. Life Ins. Co. v. Riggs, 203 U. S. (1906) 243, 51 L. ed. 168; German Alliance Ins. Co. v. Lewis, 233 U. S. (1914) 389, 58 L. ed. 1011; South Carolina ex rel. v. McMaster, 237 U. S. (1915) 63, 59 L. ed. 839; American Fire Ins. Co. v. King Lumber & Mfg. Co., 250 U. S. (1919) 2, 63 L. ed. 810; National Union Fire Ins. Co. v. Wanberg, 260 U. S. (1922) 71, 67 L. ed. 136; Bush v. New York L. I. Co., 135 App. Div. (1909) 447, 119 N. Y. S. 796; People v. Commercial Life Ins. Co., 247 Ill. (1910) 92, 93 N. E. 90; State v. Queen City Fire Ins. Co., 114 Minn. (1911) 471, 131 N. W. 628; Insurance Co. of N. A. v. Welch, 154 Pac. (Okla., 1916) 48; Henderson v. McMaster, 104 S. Car. (1916) 268, 88 S. E. 645; Scottish Union & Nat. I. Co. v. Wade, 59 Tex. Civ. App. (1910) 631, 127 S. W. 1186; Globe & Rutgers Fire Ins. Co. v. Walker, 150 Ga. (1920) 163, 103 S. E. 407; First Texas State Ins. Co. v. Smalley, 233 S. W. (Tex. Civ. App., 1921) 314; State v. Cannon, 125 Wash. (1923) 515, 217 Pac. 18.

[61] Baltimore &c. R. Co. v. Maryland, 21 Wall. (U. S., 1874) 456, 22 L. ed. 678; Horn Silver Min. Co. v. New York, 143 U. S. (1892) 305, 36 L. ed. 164; Pembina Consol. S. M. & M. Co. v. Pennsylvania, 125 U. S. (1888) 181, 31 L. ed. 650; Fire Assn. of Phila. v. New York, 119 U. S. (1886) 110, 30 L. ed. 342. See also: Louisville Tobacco Warehouse Co. v. Commonwealth, 106 Ky. (1899) 165, 49 S. W. 1069; Boca Mill Co. v. Curry, 154 Cal. (1908) 326, 97 Pac. 1117; Kaiser Land & Fruit Co. v. Curry, 155 Cal. (1909) 638, 103 Pac. 341; National Shutter Bar Co. v. Zimmerman & Co., 110 Md. (1909) 313, 73 Atl. 19; People ex rel. v. Mackey, 255 Ill. (1912) 144, 99 N. E. 370; New Orleans, M. & C. R. Co. v. State, 110 Miss. (1915) 290, 70 So. 355; Peters v. San Antonio, 195 S. W. (Tex. Civ. App., 1916) 989; Detroit Mtg. Corp. v. Vaughan, 211 Mich. (1916) 320, 178 N. W. 697, 182 N. W. 526; Mid-Northern Oil Co. v. Walker, 65 Mont. (1923) 414, 211 Pac. 353; People v. Simonsen, 64 Cal App. (1923) 97, 220 Pac. 442.

[62] Ashley v. Ryan, 153 U. S. (1894) 436, 38 L. ed. 773. Accord: People ex rel. v. Rice, 11 N. Y. S. (1890) 249; State v. Chicago &c. R. Co., 145 Ind. (1896) 229, 43 N. E. 226; W. Scheidel Coil Co. v. Rose, 242 Ill. (1909) 484, 90 N. E. 221; Chicago Title & Tr. Co. v. Doyle, 259 Ill. (1913) 489, 102 N. E. 790; In re United States Car Co., 60 N. J. Eq. (1899) 514, 516, 43 Atl. 673.

mission was upheld in South Carolina.[63] The value of this case as a precedent, however, is very seriously weakened by the fact that, although the judgment of the court was affirmed by Federal Supreme Court, there was no mention of the repeal power in its opinion. The case was entirely sustained on the general power to tax for the public good and to impose special fees where there were special benefits.[64] Furthermore, the fee in this case was for legitimate revenue purposes and was not discriminatory.[65] It would seem, however, that the repeal power

[63] Charlotte, C. &c. R. Co. v. Gibbes, 27 S. Car. (1887) 385, 4 S. E. 49. See also: People v. Squire, 145 U. S. (1892) 175, 36 L. ed. 666; Phoenix Assur. Co. v. Fire Dept., 117 Ala. (1898) 631, 23 So. 843; Delaware L. &c. R. Co. v. Board of Pub. Utils. Commrs., 85 N. J. L. (1913) 28, 88 Atl. 849. Other cases in which fees for particular services have been upheld are: Morgan Steamship Co. v. Louisiana Board of Health, 118 U. S. (1886) 455, 30 L. ed. 237; Nashville, C. &c. R. Co. v. Alabama, 128 U. S. (1888) 96, 32 L. ed. 352; Hendrick v. Maryland, 235 U. S. (1915) 610, 59 L. ed. 385; Kane v. New Jersey, 242 U. S. (1916) 160, 61 L. ed. 222; State v. Bixman, 162 Mo. (1901) 1, 62 S. W. 828. *Contra:* Ellis v. Frazier, 38 Ore. (1901) 462, 63 Pac. 642, 53 L. R. A. 454. See also Collins v. Society for Relief of Decayed Pilots, 73 Pa. (1873) 194.

[64] Charlotte, C. &c. R. Co. v. Gibbes, 142 U. S. (1892) 386, 35 L. ed. 1051.

[65] Corporation taxes which were not discriminatory in their nature have been upheld. Minot v. Philadelphia W. & B. R. Co., 18 Wall. (U. S., 1873) 206, 21 L. ed. 888; Pacific Exp. Co. v. Seibert, 142 U. S. (1892) 339, 35 L. ed. 1035; Western Union Tel. Co. v. Norman, 166 U. S. (1896) 717, 41 L. ed. 1182; McHenry v. Alford, 168 U. S. (1898) 651, 42 L. ed. 614; American Steel & W. Co. v. Speed, 192 U. S. (1904) 500, 48 L. ed. 538; Michigan Cent. R. Co. v. Powers, 201 U. S. (1906) 245, 50 L. ed. 744; United States Exp. Co. v. Minnesota, 223 U. S. (1912) 335, 56 L. ed. 459; Gaar, Scott & Co. v. Shannon, 223 U. S. (1912) 468, 56 L. ed. 510; Citizens' Tel. Co. v. Fuller, 229 U. S. (1913) 322, 335, 57 L. ed. 1206, 1215; Ohio Tax Cases, 232 U. S. (1914) 372, 58 L. ed 644; St. Louis S. W. R Co. v. Arkansas, 235 U. S. (1914) 350, 59 L. ed. 265; Mackay Tel. & Cable Co. v. Little Rock, 250 U. S. (1919) 94, 63 L. ed. 863; Atlantic Coast Line R. Co. v. Daughton, 262 U. S. (1922) 413, 67 L. ed. 1051; Bas v. State Tax Commn., 266 U. S. (1925) 271, 69 L. ed. 282; Baldwin Tool Works v. Blue, 240 Fed. (1916) 202; Union Pac. R. Co. v. Christensen, 275 Fed. (1921) 6; Republic Acceptance Corp. v. De Land, 275 Fed. (1921) 632; Iron City Bank v. Pittsburgh, 37 Pa. (1860) 340; Kittanning Coal Co. v. Commonwealth, 79 Pa. St. (1875) 100; In re Tiffany, 30 N. Y. S. (1894) 494; Commonwealth v. Sharon Coal Co., 164 Pa. (1894) 284, 30 Atl. 127, 128; Northwestern Masonic Aid Assn. v. Waddell, 138 Mo. (1897) 628, 40 S. W. 648; State v. Manchester &c. R., 69 N. H. (1897) 35, 38 Atl. 736; Ames v. People ex rel., 26 Colo. (1899) 83, 56 Pac. 656; Paducah St. R. Co. v. McCracken County, 105 Ky. (1899) 472, 49 S. W. 178; Bacon v. Board of State Tax Commrs., 126 Mich. (1901) 22, 85 N. W. 307; Chicago &c. R. Co. v. State, 128 Wis. (1906) 553, 108 N. W. 557;

may increase the strength of argument for such special privilege fees as are not grossly arbitrary.[66]

§ 143. But when the fee discriminated between foreign and domestic corporations, it has been held that this was *prima facie* evidence that the act was not a legitimate tax and violated due process of law.[67] If the fee is imposed on a single company or a small group of corporations it would seem to be more in the nature of a penalty

Gulf &c. R. Co. v. Adams, 90 Miss. (1907) 559, 45 So. 91; State ex rel. v. Taylor, 119 Tenn. (1907) 229, 104 S. W. 242; Missouri, K. &c. R. Co. v. Shannon, 100 Tex. (1907) 379, 100 S. W. 138; Illinois Cent. R. Co. v. Commonwealth, 33 Ky. L. (1908) 326, 110 S. W. 265; United New Jersey R. &c. Co. v. Parker, 75 N. J. L. (1908) 771, 69 Atl. 239; Rhinehart v. State, 121 Tenn. (1908) 420, 117 S. W. 219; Kaiser Land & Tr. Co. v. Curry, 155 Cal. (1909) 638, 103 Pac. 341; People ex rel. v. Glynn, 194 N. Y. (1909) 387, 87 N. E. 434; State v. Western Union Tel. Co., 111 Minn. (1910) 21, 124 N. W. 380, 126 N. W. 403; Commonwealth v. Mortgage Tr. Co., 227 Pa. (1910) 163, 76 Atl. 5; Darnell v. Indiana, 226 U. S. (1912) 390, 57 L. ed. 267; Denver v. Hobbs' Est., 58 Colo. (1914) 220, 144 Pac. 874; People ex rel. v. Mystic Workers of the World, 270 Ill. (1915) 496, 110 N. E. 907; Commercial Tr. Co. v. Hudson County, 87 N. J. L. (1915) 179, 92 Atl. 799; Magnolia Bank v. Pike County, 111 Miss. (1916) 857, 72 So. 697; Ewert v. Taylor, 38 S. Dak. (1916) 124, 160 N. W. 797; First Nat. Bank v. Moon, 102 Kans. (1918) 334, 170 Pac. 33; Massachusetts Bonding & Ins. Co. v. Chorn, 274 Mo. (1918) 15, 201 S. W. 1122; State ex rel. v. Johnson, 170 Wis. (1919) 251, 175 N. W. 589; Constantin Refin. Co. v. Day, 147 La. (1920) 623, 85 So. 613; American Uniform Co. v. Commonwealth, 237 Mass. (1920) 42, 129 N. E. 622; Union Steam Pump Sales Co. v. Secretary of State, 216 Mich. (1922) 261, 185 N. W. 353.

[66] New York, P. & N. Tel. Co. v. Dolan, 265 U. S. (1924) 96, 68 L. ed. 916.

[67] American Smelting & Refining Co. v. Colorado ex rel., 204 U. S. (1906) 103, 51 L. ed. 393.

Although this opinion ostensibly rests on the obligation of contract clause it seems only explicable as a subconscious application of due process by the court. See also: Leecraft v. Texas Co., 281 Fed. (1922) 918. Other cases in which discriminatory taxes against foreign corporations have been held void are: Erie R. Co. v. State, 31 N. J. L. (1864) 531, 86 Am. Dec. 226; Worth v. Wilmington & W. R. Co., 89 N. Car. (1883) 291, 45 Am. Rep. 679; In re Page, 60 Kans. (1899) 842, 58 Pac. 478; State ex rel. v. Poynter, 59 Nebr. (1899) 417, 81 N. W. 431; Mutual Reserve Fund L. A. v. Augusta, 109 Ga. (1900) 73, 35 S. E. 71; Aachen & Munich F. I. Co. v. Omaha, 72 Nebr. (1904) 518, 101 N. W. 3; H. K. Mulford Co. v. Curry, 163 Cal. (1912) 276, 125 Pac. 236; American Uniform Co. v. Commonwealth, 237 Mass. (1920) 42, 129 N. E. 622 at 623; People ex rel. v. Walsh, 202 App. Div. (1922) 651, 195 N. Y. S. 184; Valentine v. Canada Life Assur. Co., 106 Ohio St. (1923) 273, 140 N. E. 150; Airway Elec. Appliance Corp. v. Day, 266 U. S. (1924) 71 at 85, 69 L. ed. 178; Bethlehem Motors Corp. v. Flynt, 256 U. S. (1921) 421, 65 L. ed. 1029.

than a tax.[68] A most difficult case of this nature arose in Kansas in 1910. The Western Union Telegraph Company had entered the state when there were no heavy license taxes and had invested a large sum of money in erecting telegraph lines. Subsequently the state sought to impose a heavy license fee measured by the total capital stock of the corporation. This exaction was held unconstitutional, largely on the ground that it was a tax on interstate commerce,[69] but Chief Justice White, in a concurring opinion, indicated that some of the court considered that it would have been void as a violation of due process of law, had the corporation been engaged only in domestic business. In reality it was not a tax but a measure intended to confiscate property after the company had entered the state in good faith.[70]

This case, like another of similar nature three years later,[71] was decided by a divided court of five to four. It is evident that the court recognized the difficulty of the

[68] Reservation of the power to impose such a fee will not be implied from a general provision to alter, amend, and repeal; for to do so would impair vested rights of the corporation and so violate due process. Owensboro v. Cumberland Tel. & Tel. Co., 230 U. S. (1913) 58, 57 L. ed. 1389. (Five to four decision.) The second child labor case was decided partly on the ground that a penalty may not be imposed under the guise of a tax. Bailey v. Drexel Furn. Co., 259 U. S. (1922) 20, 66 L. ed. 818.

[69] Western Union Tel. Co. v. Kansas ex rel., 216 U. S. (1910) 1, 54 L. ed. 355. See the opinion of Justice Harlan. This decision was foreshadowed in Ludwig v. Western Union Tel. Co., 216 U. S. (1909) 146, 54 L. ed. 423.

[70] "This cause is concerned not with the power of the state to prevent a corporation from coming in for the purpose of doing local business, and to attach conditions to the privilege of so coming in, but involves the right of the state to confiscate the property of the corporation already within the state, and which has been there for years, devoted to the doing of local business as the result of the implied invitation or tacit consent of the state, arising from its failure to forbid or to regulate the coming in. In other words, this case involves determining, not how far a state may arbitrarily exclude, but to what extent, after allowing a corporation to come in and acquire property, a state may take its property within the state without compensation, upon the theory that the corporation is not in the state, and has no property right therein which is not subject to confiscation." Western Union Tel. Co. v. Kansas ex rel., 216 U. S. (1910) 1 at 50, 54 L. ed. 355.

[71] Owensboro v. Cumberland, Tel. & Tel. Co., 230 U. S. (1913) 58, 57 L. ed. 1389. See also: Southern Bell Tel. & Tel. Co. v. Railroad Commn. of S. Car., 280 Fed. (1922) 901.

principle involved. If the power to alter be absolute it may practically prevent the functioning of due process of law in certain cases. If, however, it be subject to the limitation of due process, it is hard to see how the reservation of the right to alter the charter gives the legislature much more power in the matter of the levy of license fees than they had under the general power of taxation.

§ 144. The tax exemption cases have caused less difficulty. In 1872 the question of the repeal of exemptions from taxation under the power to amend was decided in the affirmative.[72] There is no forfeiture of the general property of the corporation in these cases, for the courts have consistently held that tax exemption is not a property right. It is therefore held to be peculiarly subject to the repeal power,[73] even though the tax exemption was

[72] "The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state." Justice Field, Tomlinson v. Jessup, 15 Wall. (U. S., 1872) 454, 21 L. ed. 204. See also Commonwealth v. Fayette Co. R. Co., 55 Pa. (1867) 452. Earlier state cases to similar effect are: Hart v. Cornwall, 14 Conn. (1841) 228; Milan & R. Plank Rd. Co. v. Husted, 3 Ohio St. (1854) 578; State v. Crittenden County Ct., 19 Ark. (1858) 360; Commonwealth v. Fayette Co. R. Co., 55 Pa. (1867) 452; State v. Newark, 35 N. J. L. (1871) 157, 10 Am. Rep. 223; Jones & Nimick Mfg. Co. v. Commonwealth, 69 Pa. St. (1871) 137; Union Imp. Co. v. Commonwealth, 69 Pa. St. (1871) 140.

[73] "The state retained the power to alter it in all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges and immunities. The existence of the corporation, and its franchises and immunities, derived directly from the state, were thus kept under its control. Rights and interests acquired by the company, not constituting a part of the contract of incorporation, stand upon a different footing. But no such rights or interests are here involved." Justice Field, Railroad Co. v. Maine, 96 U. S. (1877) 499 at 510, 511, 24 L. ed. 836.

See also: Hoge v. Railroad Co., 99 U. S. (1878) 348, 25 L. ed. 303; Louisville Water Co. v. Clark, 143 U. S. (1892) 1, 36 L. ed. 55; Gulf &c. R. Co. v. Hewes, 183 U. S. (1901) 66, 46 L. ed. 86; Northern Cent. R. Co. v. Maryland, 187 U. S. (1902) 258, 47 L. ed. 167; Seton Hall College v. South Orange, 242 U. S. (1916) 100, 61 L. ed. 170; New York ex rel. v. Mealy, 254 U. S. (1920) 47, 65 L. ed. 123; Hewitt v. New York &c. R. Co., Fed. Cas. No. 6,443 (1875); Northern Bank of Ky. v. Stone, 88 Fed. (1898) 413; Iron City Bank v. Pittsburgh, 37 Pa. (1860) 340; State v. Commission of R. Taxation, 37 N. J. L. (1874) 228; West Wisconsin R Co. v. Trempealeau, 35 Wis. (1874) 257; State v. Northern Cent. R. Co., 44 Md. (1876) 131; State v. Maine Cent. R. Co., 66 Maine (1877) 488; Wagner Free Institute v. Philadelphia, 132 Pa. St. (1890) 612, 19 Atl. 297; Deposit Bank v. Daviess, 102 Ky. (1897) 174, 39 S. W. 1030; Pratt

Institute v. New York City, 183 N. Y. (1905) 151, 75 N. E. 1119; People ex rel. v. Gass, 190 N. Y. (1907) 323, 83 N. E. 64; People ex rel. v. Raymond, 126 App. Div. (1909) 720, 111 N. Y. S. 177; State v. Baltimore &c. R. Co., 127 Md. (1916) 434, 96 Atl. 636; McClement v. Supreme Court I. O. F., 222 N. Y. (1918) 470, 119 N. E. 99; People ex rel. v. Wendell, 197 App. Div. (1921) 131, 188 N. Y. S. 344; State ex rel. v. Rowe, 108 Nebr. (1922) 232, 188 N. W. 107.

If the charter is not repealable the tax exemptions form a valid contract which can not be altered: New Jersey v. Wilson, 7 Cranch (U. S., 1812) 164, 3 L. ed. 303; Jefferson Branch Bank v. Skelly, 1 Black (U. S., 1861) 436, 17 L. ed. 173; McGee v. Mathis, 4 Wall. (U. S., 1866) 143, 18 L. ed. 314; Home of the Friendless v. Rouse, 8 Wall. (U. S., 1869) 430, 19 L. ed. 495; Washington University v. Rouse, 8 Wall. (U. S., 1869) 439, 19 L. ed. 498; Wilmington R. v. Reid, 13 Wall. (U. S., 1871) 264, 20 L. ed. 568; Raleigh &c. R. Co. v. Reid, 13 Wall. (U. S., 1871) 269, 20 L. ed. 570; Humphrey v. Pegues, 16 Wall. (U. S., 1872) 244, 21 L. ed. 326; Pacific R. Co. v. Maguire, 20 Wall. (U. S., 1873) 36, 22 L. ed. 282; Northwestern University v. People, 99 U. S. (1878) 309, 25 L. ed. 387; St. Anna's Asylum v. New Orleans, 105 U. S. (1881) 362, 26 L. ed. 1128; Wicomico County Commrs. v. Bancroft, 203 U. S. (1906) 112, 51 L. ed. 112; Choate v. Trapp, 224 U. S. (1912) 665, 56 L. ed. 941; Gleason v. Wood, 224 U. S. (1912) 679, 56 L. ed. 947; English v. Richardson, 224 U. S. (1912) 680, 56 L. ed. 949; Ward v. Board of County Commrs. of Love County, Okla., 253 U. S. (1919) 17, 64 L. ed. 751; Illinois Cent. R. Co. v. Emmerson, 299 Ill. (1921) 328, 132 N. E. 471; Thompson v. Holton, Fed. Cas. No. 13958 (1855); Tennessee v. Whiteworth, 22 Fed. (1884) 75; East Tennessee, V. &c. R. Co. v. Pickerd, 24 Fed. (1885) 614; Barnes v. Kornegay, 62 Fed. (1894) 671; Atwater v. Woodbridge, 6 Conn. (1826) 223, 16 Am. Dec. 46; Hardy v. Waltham, 24 Mass. (1828) 108; Osborne v. Humphrey, 7 Conn. (1829) 335; Landon v. Litchfield, 11 Conn. (1836) 251; Seymour v. Hartford, 21 Conn. (1852) 481; O'Donnell v. Bailey, 24 Miss. (1852) 386; Matheny v. Golden, 5 Ohio St. (1856) 361; South Pac. R. Co. v. Laclede County, 57 Mo. (1874) 147; State v. Commissioner of R. Tax., 37 N. J. L. (1874) 240; Oliver v. Memphis &c. R. Co., 30 Ark. (1875) 128; St. Louis, I. M. &c. R. Co. v. Loftin, 30 Ark. (1875) 693; State v. Georgia R. &c. Co., 54 Ga. (1875) 423; Londonderry v. Berger, 7 Leg. Gaz. (Pa., 1875) 231; Mobile &c. R. Co. v. Moseley, 52 Miss. (1876) 127; State v. Baltimore &c. R. Co., 48 Md. (1877) 49; Scotland v. Missouri I. &c. R. Co., 65 Mo. (1877) 123; Knoxville &c. R. Co. v. Hicks, 68 Tenn. (1877) 442; Gonzales v. Sullivan, 16 Fla. (1878) 791; People v. Soldiers' Home, etc., 95 Ill. (1880) 561; Franklin Co. Ct. v. Deposit Bank of Frankfort, 87 Ky. (1888) 370, 9 S. W. 212; Memphis &c. R. Co. v. Berry, 41 Ark. (1883) 436; Worth v. Wilmington &c. R. Co., 89 N. Car. (1883) 291, 45 Am. Rep. 679; Worth v. Petersburg R. Co., 89 N. Car. (1883) 301; Northern Pac. R. Co. v. Carland, 5 Mont. (1884) 146, 3 Pac. 134; Commonwealth v. Richmond &c. R. Co., 81 Va. (1886) 355; In re Stevens County, 36 Minn. (1887) 467, 31 N. W. 942; Mt. Pleasant Cemetery Co. v. Newark, 52 N. J. L. (1890) 539, 20 Atl. 832; St. Vincent's College v. Schaefer, 104 Mo. (1891) 261, 16 S. W. 395; Commonwealth v. Philadelphia &c. R. Co., 164 Pa. (1894) 252, 30 Atl. 145; State v. Alabama Bible Soc., 134 Ala. (1902) 632, 32 So. 1011; State ex rel. v. Westminster College, 175 Mo. (1903) 62, 74 S. W. 1116; Bennett v. Nichols, 9 Ariz. (1905) 138, 80 Pac. 392; Lake Drummond Canal &c. Co. v. Commonwealth, 103 Va. (1905) 337, 49 S. E. 506; Carstens v. Fond du Lac, 137 Wis. (1909) 465, 119 N. W. 117; North St. Louis Gymnastic Soc. v. Hagerman, 232

granted for a *bona fide* consideration.[74] It must be remembered that with a few exceptions this line of cases

Mo. (1911) 693, 135 S. W. 42; Lieber v. Rogers, 37 Okla. (1913) 614, 133 Pac. 30; City Council of Augusta v. Augusta-Aiken R. & Elec. Corp., 150 Ga. (1920) 529, 104 S. E. 503.

But if there is no consideration many courts have held the exemption purely a gratuity and hence repealable even without reservation of that right. Christ Church v. Philadelphia, 24 How. (U. S., 1860) 300, 16 L. ed. 602; Tucker v. Ferguson, 22 Wall. (U. S., 1874) 527, 22 L. ed. 805; West Wisconsin R. Co. v. Trempealeau County, 93 U. S. (1876) 595, 23 L. ed. 814; Welch v. Cook, 97 U. S. (1878) 541, 542, 24 L. ed. 1112; Henderson Bridge Co. v. Henderson, 173 U. S. (1899) 592, 43 L. ed. 823; Seton Hall College v. South Orange, 242 U. S. (1916) 100, 61 L. ed. 170; Sweet v. Schock, 245 U. S. (1917) 192, 62 L. ed. 237; Christ Church Hospital v. Philadelphia, 24 Pa. St. (1855) 229; People ex rel. v. Roper, 35 N. Y. (1866) 629; Washington University v. Rowse, 42 Mo. (1868) 308; Lord v. Litchfield, 36 Conn. (1869) 116, 4 Am. Rep. 41; Wilmington & W. R. Co. v. Reid, 64 N. Car. (1870) 226; Rose v. Charleston, 3 S. Car. (1871) 369; People ex rel. v. Commissioners of Taxes, 47 N. Y. (1872) 501; State v. Hannibal &c. R. Co., 60 Mo. (1875) 143; Probasco v. Moundsville, 11 W. Va. (1877) 501; Appeal Tax Court v. University of Md., 50 Md. (1878) 457; Philadelphia v. Contributors to Phila. Hospital, 134 Pa. (1890) 171, 19 Atl. 490; Grand Lodge of F. & A. M. v. New Orleans, 44 La. Ann. (1891) 659, 11 So. 148; Ladd v. Portland, 32 Ore. (1898) 271, 51 Pac. 654; Hanover v. Camp Meeting Assn., 76 N. J. L. (1908) 827, 71 Atl. 1134; Bragg v. United States, 2 Ct. Cust. App. (1911) 22; Massachusetts Gen. Hospital v. Inhabitants of Belmont, 233 Mass. (1919) 190, 124 N. E. 21; State ex rel. v. Koeln, 282 Mo. (1919) 438, 222 S. W. 389; Pardee v. Rayfield, 192 App. Div. (1919) 5, 182 N. Y. S. 3; State v. Crystal Lake Cemetery Assn., 155 Minn. (1923) 187, 193 N. W. 170; State v. Kelly, 186 N. Car. (1924) 365, 119 S. E. 755. See also: Rochester R. Co. v. Rochester, 205 U. S. (1906) 236, 51 L. ed. 784; Clark v. Louisville Water Co., 12 Ky. L. (1890) 444; Manistee &c. R. Co. v. Commissioner of Railroads, 118 Mich. (1898) 349, 76 N. W. 633; Newport v. Commonwealth, 106 Ky. (1899) 434, 50 S. W. 845; Miller v. Hageman, 114 Iowa (1901) 195; 86 N. W. 281; Saginaw v. Hubinger, 137 Mich. (1904) 72, 100 N. W. 261; Galloway v. Memphis, 116 Tenn. (1906) 736, 94 S. W. 75.

[74] The statute provided that if banks gave up certain privileges (among which was an irrepealable charter) they would be granted tax exemption. The legislature subsequently repealed the tax exemption and the courts held it not to be a "right previously vested." Justice Taft declared that although all repealable charters are subject to the conservation of rights previously vested, this did not divest such a right. "A legislature can not by amendment or repeal of a charter, deprive the members of a corporation of the property or contract rights it has acquired by the exercise of its corporate powers. . . . It cannot annul contracts made by the corporation with third persons in the exercise of its lawful franchises. It cannot undo that which is done. It cannot say that that does not exist which does in fact exist. It cannot recall an executed grant of property. But it can revoke for the future anything in the charter of a promissory character, whether it is contractual or merely gratuitous." Northern Bank v. Stone, 88 Fed. (1898) 413 at 426. The same act was upheld in Citizens Sav. Bank v. Owensboro, 173 U. S. (1899) 636, 43 L. ed. 840. Justice

was decided during the nineteenth century when the court was exceedingly hesitant in the application of due process of law to new types of cases. It may be questioned, therefore, in view of the more recent cases dealing with license fees, if the court would react as kindly toward the repeal of tax exemptions where a real consideration had been given for it.[75] Indeed even in the nineties it was held that, if the consideration was a continuing one, the corporation was released from it when the tax exemption was repealed. Had this release not been implied in the statute it probably would have violated due process of law.[76] The developments during the last quarter century have pointed more clearly in the direction of a greater judicial vigilance.[77]

§ 145. When the legislature has expressly reserved the right to repeal the charter, there would seem to be no difficulty in the termination of the existence of the corporation. Some courts have declared that the power of the legislative body is plenary in this respect,[78] and in several cases automatic dissolution laws have been enforced.[79] In some of these cases, however, the charter has

Brown dissented on the ground that the tax exemption was part of the contract and hence a vested right.

[75] Note that the legislature can not repeal the tax exemption of a charitable institution by implication. People ex rel. v. Raymond, 194 N. Y. (1909) 189, 87 N. E. 90.

[76] Louisville Water Co. v. Clark, 143 U. S. (1892) 1, 36 L. ed. 55; Stearns v. Minnesota, 179 U. S. (1900) 223, 45 L. ed. 223; Duluth &c. R. Co. v. St. Louis Co., 179 U. S. (1900) 302, 45 L. ed. 201; Bank of Kentucky v. Commonwealth, 207 U. S. (1907) 258, 52 L. ed. 197. But see: Hochfeld v. Portland, 72 Ore. (1914) 190, 142 Pac. 824. Of course a change in the method of taxation is valid under the repeal power. Mayor of New York v. 23rd St. R. Co., 113 N. Y. (1889) 311, 21 N. E. 60; Omaha Water Co. v. Omaha, 147 Fed. (1906) 1.

[77] See especially the reasoning in Stearns v. Minnesota, 179 U. S. (1900) 223, 45 L. ed. 162. See also: Wright v. Central of Georgia R. Co., 236 U. S. (1915) 674, 59 L. ed. 781; Colorado Farm & Live Stock Co. v. Beerbohm, 43 Colo. (1908) 464, 96 Pac. 443; Board of Commrs. of Okfuskee County v. Hutton, 72 Okla. (1919) 223, 179 Pac. 922.

[78] Hinckley v. Schwarzschild &c. Co., 107 App. Div. (1905) 470, 95 N. Y. S. 357; Kenosha, R. &c. Co. v. Marsh, 17 Wis. (1863) 13; Yeaton v. Bank of the Old Dominion, 21 Grat. (Va., 1872) 593. See also State v. Louisville &c. R. Co., 97 Miss. (1910) 35, 51 So. 918, 53 So. 454.

[79] Hawley v. Bonanza Queen Min. Co., 61 Wash. (1910) 90, 111 Pac.

been revoked because of reasons which seem commendable. When a charter is revoked because the corporation has been mismanaged,[80] because of the necessity of making some police regulation,[81] or because of its non-

1073; Louisville Bank. Co. v. Commonwealth, 142 Ky. (1911) 690, 134 S. W. 1142. See also: Central Lumber Co. v. South Dakota, 226 U. S. (1912) 157, 57 L. ed. 164; Rillito Canal Co. v. Schmidt, 11 Ariz. (1907) 49, 89 Pac. 523; State v. French Lick Springs Hotel Co., 42 Ind. App. (1907) 282, 82 N. E. 801, 85 N. E. 724; Flowing Wells Co. v. Culin, 11 Ariz. (1908) 425, 95 Pac. 111; Kaiser Land & Fruit Co. v. Curry, 155 Cal. (1909) 638, 103 Pac. 341; State ex rel. v. Syndicate Land Co., 142 Iowa (1909) 22, 120 N. W. 327; Newhall v. Western Zinc Min. Co., 164 Cal. (1912) 380, 128 Pac. 1040; State ex rel. v. Birmingham Water Works Co., 185 Ala. (1913) 388, 64 So. 23; Big Four Advertising Co. v. Clingan, 15 Ariz. (1913) 34, 135 Pac. 713; Enos v. Hanff, 98 Nebr. (1915) 245, 152 N. W. 397; State ex rel. v. Public Drug Co., 41 S. Dak. (1919) 287, 170 N. W. 161.

[80] As when an insurance company is found to have liabilities greater than its assets. Lathrop v. Stedman, 42 Conn. (1875) 583, 13 Blatchf. 134, Fed. Cas. No. 8519; Boswell v. Security Mut. Life Ins. Co., 193 N. Y. (1908) 465, 86 N. E. 532; State ex rel. v. Globe Casket & Undertaking Co., 82 Wash. (1914) 124, 143 Pac. 878. See also: State ex rel. v. Syndicate Land Co., 142 Iowa (1909) 22, 120 N. W. 327.

[81] As when the charter of a beer company is revoked in the effort to establish prohibition. The court declared this revocation would have been valid had no such power been reserved. Boston Beer Co. v. Massachusetts, 97 U. S. (1877) 25, 24 L. ed. 989.

Recent cases dealing with the general topic of conflicts between the police power and the obligation of contracts clause are: Coyle v. Smith, 221 U. S. (1911) 559, 55 L. ed. 853; Marcus Brown Holding Co. v. Feldman, 256 U. S. (1921) 170, 65 L. ed. 877; Community Chautauquas Inc. v. Caverly, 244 Fed. (1918) 893; Chicago, St. P. M. &c. R. Co. v. Douglas County, 134 Wis. (1908) 197, 114 N. W. 511; State v. Barrett, 172 Ind. (1909) 169, 87 N. E. 7; Venner v. Chicago City R. Co., 246 Ill. (1910) 170, 92 N. E. 643; Grand Trunk Western R. Co. v. South Bend, 174 Ind. (1910) 203, 89 N. E. 885, 91 N. E. 809; Bacon v. Boston & M. R., 83 Vt. (1910) 421, 76 Atl. 128; German Ins. Co. v. Commonwealth, 141 Ky. (1911) 606, 133 S. W. 793; Baker City Mut. Irr. Co. v. Baker City, 58 Ore. (1911) 306, 110 Pac. 392, 113 Pac. 9; Shelby v. Cleveland Mill & Power Co., 155 N. Car. (1911) 196, 71 S. E. 218; Atlantic Coast Line R. R. v. Railroad Commn., 89 S. Car. (1911) 472, 72 S. E. 18; Dirken v. Great Northern Paper Co., 110 Maine (1913) 374, 86 Atl. 320; Union Dry Goods Co. v. Georgia Pub. Serv. Corp., 142 Ga. (1914) 841, 83 S. E. 946; Yeatman v. Towers, 126 Md. (1915) 513, 95 Atl. 158; Colorado Postal Tel. Co. v. Colorado Springs, 61 Colo. (1916) 560, 158 Pac. 816; Southern Realty Co. v. Tchula Co-Operative Stores, 114 Miss. (1917) 309, 75 So. 121; North Carolina Corp. Commn. v. Seabord Air Line R. Co., 173 N. Car. (1917) 413, 92 S. E. 150; In re Relief Elec. Light, Heat & Power Co., 63 Pa. Super. Ct. (1917) 1; Raymond Lumber Co. v. Raymond Light &c. Co., 92 Wash. (1917) 330, 159 Pac. 133; Jenkins Township v. Public Serv. Commn., 65 Pa. Super. Ct. (1918) 122; Interurban R. & Terminal Co. v. Public Utils. Commn., 98 Ohio St. (1918) 287, 120 N. E. 831; Schiller Piano Co. v. Illinois Northern Utils. Co., 288 Ill. (1919) 580, 123 N. E. 631; Waterbury v.

use,[82] the judges are surer of their ground in upholding the law. But if the charter is revoked in bad faith, or for reasons which are capricious or wanton, a much more difficult case is presented. Some courts have declared that although in the main it is for the legislature to judge the validity of the case for the repeal, if the legislative power is obviously abused, the act will be declared void.[83]

Central Vermont R. Co., 93 Vt. (1919) 461, 108 Atl. 423; Chicago v. Washingtonian Home of Chicago, 289 Ill. (1920) 206, 124 N. E. 416; Kuenzli v. Stone, 112 Misc. (1920) 125, 182 N. Y. S. 680; Chicago R. I. &c. R. Co. v. Taylor, 79 Okla. (1920) 142, 192 Pac. 349; Union Trac. Co. v. Muncie, 80 Ind. App. (1922) 260, 133 N. E. 160; Grisim v. South St. Paul Live Stock Exch., 152 Minn. (1922) 271, 188 N. W. 729; Southern Utils. Co. v. Palatka, 86 Fla. (1924) 583, 99 So. 236.

[82] Chincleclamouche Lumber & Boom Co. v. Commonwealth, 100 Pa. (1882) 438. See also: State v. Delmar Jockey Club, 200 Mo. (1906) 34, 92 S. W. 185, 98 S. W. 539; T. E. Hill Co. v. Cleary, 134 Ill. App. (1907) 88; Reed v. Sampson, 54 Tex. Civ. App. (1909) 552, 118 S. W. 749; Webster v. Susquehanna Pole Line Co., 112 Md. (1910) 416, 76 Atl. 254; Sullivan v. Central Land Co., 173 Ala. (1911) 426, 55 So. 612; People v. Stilwell, 78 Misc. (1912) 96, 138 N. Y. S. 693; State ex rel. v. Birmingham Water Works Co., 185 Ala. (1913) 388, 64 So. 23; State ex rel. v. Rapid City Library Assn., 32 S. Dak. (1913) 248, 142 N. W. 973; Mobile Temperance Hall Assn. v. Holmes, 189 Ala. (1914) 271, 65 So. 1020; Brock v. Poor, 216 N. Y. (1915) 387, 111 N. E. 229; West End Dock v. State, 173 S. W. (Tex. Civ. App., 1915) 285.

[83] "It never could have been the purpose of the convention to reserve to the legislature a mere power to revoke charters from whim or caprice, and without any cause; such an idea would be fatal to all public improvement, through the action of corporations." However, the legislature must judge the validity of the cause and the court will only step in when there is no cause at all. Delaware R. Co. v. Tharp, 5 Harr. (Del., 1854) 454 at 456.

"When charter itself or a general statute provides that the charter is subject to repeal by the legislature, at its pleasure, without restrictions or conditions limiting the power of repeal, the legislature has the right to exercise its power summarily, and at will, and its action, being a legislative and not a judicial act, can not be reviewed by the courts, unless it should exercise its power so wantonly and causelessly as palpably to violate the principles of natural justice, and in such case a repeal, like other legislative acts which do this palpably, violate the principles of natural justice, may be reviewed by the courts. The power of the legislature, therefore, is not unlimited, for the private rights of persons are not subject to an unjust and despotic exercise of power by a legislature without means of redress." Justice Shipman, Lothrop v. Steadman, 42 Conn. (1875) 583 at 590, 13 Blatchf. 134, Fed. Cas. No. 8519. In State v. Curran, 12 Ark. (1851) 321, it was said that the court will presume the repeal was made for good motives. See also Crease v. Babcock, 23 Pick. (Mass., 1839) 334, 34 Am. Dec. 61; State v. Louisville & N. R. Co., 97 Miss. (1910) 35, 51 So. 918, 53 So. 454; and Seitzinger v. December Oil Co., 1 Leg. Chron. (Pa., 1873) 234, in which the courts assumed that the legislature provided before a hearing, before repealing the charter. But the situation is different if the charter is only repealable for misuse. Under this circumstance the court will judge

The extent to which the courts have gone in sustaining the legislation, however, is shown by their attitude toward legislative revocation of charters because the corporation removes cases into the federal courts. Laws which force a corporation to agree in advance not to remove a suit into a federal court have been consistently declared void.[84] On the other hand in the Prewitt case the power of repealing charters was considered so broad that the legislature could pass a special law directing some administrative body to revoke the grant after a case had been transferred to a federal court.[85]

It seems very difficult to reconcile this view with the rule of the Home Insurance Case.[86] If the state cannot force a corporation to agree in advance not to exercise its constitutional rights, there seems very little reason why it should be permitted to arbitrarily revoke the privileges of the corporation upon the exercise of those rights. In point of fact, the court has had great difficulty in maintaining the small distinction which does exist between

if the corporate privileges have been abused. Commonwealth v. Pittsburg &c. R. Co., 58 Pa. (1868) 26.

[84] Home Ins. Co. v. Morse, 20 Wall. (U. S., 1874) 445, 22 L. ed. 365; Doyle v. Continental Ins. Co., 94 U. S. (1876) 535, 24 L. ed. 148; Barron v. Burnside, 121 U. S. (1887) 186, 30 L. ed. 915; Southern Pac. Co. v. Denton, 146 U. S. (1892) 202, 36 L. ed. 943; Barrow Steamship Co. v. Kane, 170 U. S. (1898) 100, 42 L. ed. 964; Blake v. McClung, 172 U. S. (1898) 239, 43 L. ed. 432. Nor can a corporation be compelled to waive its constitutional immunity from taxation on interstate commerce or any other constitutional rights. Pullman Co. v. Kansas ex rel., 216 U. S. (1910) 56, 54 L. ed. 378.

[85] "Where the statute exacts a stipulation in advance, as a condition of granting a permit, and the statute is not separable into parts, the whole statute is void, and a provision for withdrawing the permit, if a case is removed, is not saved. . . .

"As a state has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reasons for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial. . . .

"Mere enactment of a statute which, in substance, says if you choose to exercise your right to remove a case into a Federal court, your right to further do business within the state shall cease and your permit shall be withdrawn, is not open to any constitutional objection." Security Mut. Life Ins. Co. v. Prewitt, 202 U. S. (1906) 246, 50 L. ed. 1013.

[86] Home Ins. Co. v. Morse, 20 Wall. (U. S., 1874) 455, 22 L. ed. 365.

these cases. Consequently, the rule of the Prewitt Case has been gradually whittled away,[87] until in 1922 Chief Justice Taft declared that it "must be considered overruled."[88]

§ 146. If the termination of the existence of the company affects the value of its property, the situation is entirely different. It is one thing to prohibit the corporation from doing business in the state, but it is quite another to permit it to begin operations and subsequently to destroy all the actual value which its tangible property may have by prohibiting it from continuing business. The early federal cases upheld this power even though property rights were involved,[89] and the Supreme Court even declared that a street railroad whose franchise had been revoked must itself pay for the removal of the rails.[90]

[87] Western Union Tel. Co. v. Kansas ex rel., 216 U. S. (1910) 1, 54 L. ed. 355; Roach v. Atchison, T. &c. R. Co., 218 U. S. (1910) 159, 54 L. ed. 978; Harrison v. St. Louis &c. R. Co., 232 U. S. (1914) 318, 58 L. ed. 621.

[88] Terral v. Burke Constr. Co., 257 U. S. (1922) 529, 66 L. ed. 352.

[89] In re Northwestern R. Co., 20 Inter. Rev. Rec. (1874) 18; Fed. Cas. No. 10, 340; State v. Louisville &c. R. Co., 97 Miss. (1910) 35, 51 So. 918, 53 So. 454.

[90] "Whatever right remained in the Marginal Company [with its charter repealed] to its rolling-stock, its horses, its harness, its stables, the debts due to it, and the funds on hand, if any, it no longer had the right to run its cars through the street, or any of the streets of Boston. It no longer had the right to encumber these streets with a railroad track which it could not use, for these belonged by law to no person of right, and were vested in defendants only by virtue of the repealed charter.

"It is, therefore, in the power of the Massachusetts legislature to grant to another corporation, as it did, the authority to operate a street railroad through the same streets and over the same ground previously occupied by the Marginal Company." Justice Miller, Greenwood v. Freight Co., 105 U. S. 13 at 21, 22, 26 L. ed. 961. See also Hamilton Gas Light & Coke Co. v. Hamilton, 146 U. S. (1892) 258, 36 L. ed. 963, where it was held that the repeal power authorizes the city to engage in the gas business in competition with the company.

It does not follow, of course, that the act can impair the rights of a creditor in the assets of a corporation. Curran v. Arkansas, 15 How. (U. S., 1853) 304 at 312, 14 L. ed. 705. Pierce v. United States, 252 U. S. (1921) 239, 64 L. ed. 542. Hence the corporations may continue to exist, after its charter has been revoked, in order to wind up its affairs. Board of Councilmen v. Deposit Bank, 124 Fed. (1903) 18; Crease v. Babcock, 23 Pick. (Mass., 1839) 334, 34 Am. Dec. 61.

On the general power of the corporation to exist to wind up its affairs after its charter is revoked see: Stearns Coal & Lumber Co. v. Van Winkle, 241 U. S. (1916) 670, 60 L. ed. 1230; Metropolitan Rubber Co. v.

Both of these decisions, however, were rendered before the federal courts developed due process as a real restriction upon legislative arbitrariness.

More recently the courts, in a number of cases, have taken a somewhat different attitude. As early as 1856 Justice Lewis in Pennsylvania made a strong dissenting plea for due process as a limitation on abuses of this power.[91] The New York courts have several times intimated that a charter could not be repealed unless provision was made for winding up the affairs of the corporation so that the property rights would be conserved to the share-

Place, 147 Fed. (1906) 90; Harris-Woodbury Lumber Co. v. Coffin, 179 Fed. (1910) 257; Cushman v. Warren-Scharf A. P. Co., 220 Fed. (1915) 857, 238 U. S. (1915) 621, 59 L. ed. 1493; Stark Elec. R. Co. v. McGinty Cont. Co., 238 Fed. (1917) 657; Oliver v. Brennan, 292 Fed. (1923) 197; Hazard v. Park, 294 Fed. (1923) 40; Favorite Oil Co. v. Jef. Chaison Townsite Co., 162 S. W. (Tex. Civ. App., 1913) 423; Canadian Country Club v. Johnson, 176 S. W. (Tex. Civ. App., 1915) 835; Smith v. Commonwealth Land & Lumber Co., 172 Ky. (1917) 607, 189 S. W. 912; Boston Tow Boat Co. v. Medford Nat. Bank, 228 Mass. (1917) 484, 117 N. E. 928; Lucifer Coal Co. v. Buster, 64 Colo. (1918) 179, 171 Pac. 61; Gamer Co. v. Gamage, 241 S. W. (Tex. Civ. App., 1922) 736; Grand St. Realty Co. v. Universal Textile Co., 191 N. Y. S. (1922) 655; Highbaugh v. Huff, 205 Ky. (1924) 353, 265 S. W. 816. A few courts hold contrary to the general rule. Newhall v. Western Zinc Min. Co., 164 Cal. (1912) 380, 128 Pac. 1040; Brandon v. Umpqua Lumber & Timber Co., 166 Cal. (1913) 322, 136 Pac. 62; C. B. Havens & Co. v. Colonial Apart. House Co., 97 Nebr. (1915) 639, 150 N. W. 1011; Southwestern Sur. Ins. Co. v. Anderson, 152 S. W. (Tex. Civ. App., 1913) 816; Sharp v. Eagle Lake Lumber Co., 60 Cal. App. (1923) 386, 212 Pac. 933. But see Calder v. People, 218 U. S. (1910) 591, 54 L. ed. 1163, in which it was held that bondholders took the bonds subject to the repeal powers.

[91] "The state granted neither land, nor money, nor goods, and she can take none from stockholders; the reserved power to annul the charter carries with it therefore no power whatever to seize the railroad, or to divest the stockholders or the owners of the land, of their rights and property. At common law, upon the civil death of a corporation, all its real estate remaining unsold reverts to the grantor and his heirs; for the reversion in such case is a condition annexed by law, inasmuch as the cause of the grant has failed. . . . The title by reversion is as sacred as a title in possession or remainder, and the owners can not be deprived of it except by due course of law." That this case gave the court considerable trouble is shown by the fact that it granted two hearings and rendered two opinions, both of which, however, supported the act of the legislature in dissolving the corporation. Erie N. E. R. Co. v. Casey, 26 Pa. (1856) 287.

Thus there are a number of decisions which hold that franchise rights are property and so can not be repealed even though the power to revoke the charter has been reserved. See sec. 156.

holders;[92] a view which has been followed in New Jersey courts.[93] In 1909 the Supreme Court of the United States held that the right to repeal the charter did not give the state the right to deny to a foreign corporation the equal protection of the law, when there were tangible property rights involved.[94] Even in these cases the court had reference only to tangible property and it is possible to explain each of the decisions on other grounds. The power of the legislature to terminate the existence of the corporation is, therefore, exceedingly broad. Perhaps it is even broader than the power to amend the grant of incorporation.[95] It is noteworthy however, that some of

92 The New York Supreme Court declared a statute void because it did not conserve property rights (People v. O'Brien, 52 N. Y. S. (1887) 519) but the Court of Appeals reversed their decision because it found adequate provision had been made to conserve the tangible property. "The power to repeal the charter of a corporation can not, upon any legal principle include the power to repeal what is in its nature irrepealable, or to undo what has been lawfully done under power lawfully conferred." Chief Justice Ruger, People v. O'Brien, 111 N. Y. (1888) 1 at 48. See also Lord v. Equitable Life Assur. Soc., 194 N. Y. (1909) 212, 87 N. E. 443.

93 "The legislature may alter or repeal the charter and extinguish the corporate existence of the association, but it is without power to take away from the shareholders the property which they have acquired during its existence, and the Act of 1846 does not reserve the power to affect or change the rights of the corporators as between each other." Justice Van Syckel, In re Newark Library Assn., 64 N. J. L. (1899) 217 at 219, 43 Atl. 435. See also Mobile Temperance Hall Assn. v. Holmes, 189 Ala. (1914) 271.

94 The statute provided that under one set of conditions the domestic corporations could have resort to federal courts, but only under another set of conditions could foreign corporations carry suits to the national bodies. The defendant corporation had a great deal of tangible property in the state, and for carrying a suit to the federal courts its charter was revoked. "This is not a case where the state has undertaken to prevent the coming of the corporation into its borders for the purpose of carrying on business. The corporation was within the state, complying with its laws, and had acquired under the sanction of the state, a large amount of property within its borders, and thus had become a person within the state, within the meaning of the constitution and entitled to its protection." Justice Day, Herndon v. Chicago, R. I. &c. R. Co., 218 U. S. (1909) 135, 54 L. ed. 970. See also: American Smelting & Refin. Co. v. Colorado, 204 U. S. (1907) 103, 51 L. ed. 393; Ludwig v. Western Union Tel. Co., 216 U. S. (1910) 146, 54 L. ed. 423; Roach v. Atchison, T. &c. R. Co., 218 U. S. (1910) 159, 54 L. ed. 978; Harrison v. St. Louis &c. R. Co., 232 U. S. (1914) 318, 58 L. ed. 621.

95 "Under the reservation, they can repeal or destroy, without any consent on the part of the trustees but as long as they remain in existence as a corporate body, they necessarily have the power to reject an amend-

the courts, have felt need of some restrictions on this power, especially when tangible property rights are destroyed by the repeal of the charter.

ment." "The power to destroy does not imply a right to cripple or to maim." Justice Grenshaw, Sage v. Dillard, 54 Ky. (1854) 340 at 362, 363.

"In cases of repeal or suspension of charters the public good is the sole criterion, but in cases of their alteration, with which alone we have to deal, an added requirement is that such alteration shall bear such relation to the original charter as to be in effect regulative of the rights and duties thereby conferred or imposed." Justice Garrison, Delaware L. &c. R. Co. v. Board of Public Util. Commrs., 85 N. J. L. (1913) 28 at 33, 88 Atl. 849. See also Colby v. Equitable Tr. Co., 192 N. Y. (1908) 535, 84 N. E. 1111.

CHAPTER XX.

REGULATIONS FOR THE PUBLIC BENEFIT.

§ 147. It seems probable that the regulations of corporations for the public interest under the police power are valid whether the power to alter the charter has been reserved or not. Indeed, practically all the regulations which have been made even under the repeal power, have been in the nature of "police" regulations, and one court has gone so far as to declare that the reservations of the right to repeal the charter does not give the legislature any more power than it had under the police power.[1] This is probably true in regard to corporations dealing with the public credit, for, with regard to these bodies, the state has very wide powers of police regulation. An act making stockholders of a bank individually liable for the debts of the corporation was upheld as a valid exercise both of the police power and the power to alter the charter,[2] but under the repeal power this may be made retro-

[1] Troy &c. R. Co. v. Kerr, 17 Barb. (N. Y., 1854) 581. See the curious case of Dingman v. People, 51 Ill. (1869) 277, in which it was held that the legislature could repeal the part of the charter of the University of Chicago and permit the sale of liquor within one mile of the campus even though the power to repeal the charter was not reserved. This was valid under the police power.

[2] Sherman v. Smith, 1 Black (U. S., 1861) 587, 17 L. ed. 163. Cf. State v. Curran, 12 Ark. (1851) 321 (reversed 15 How. 304, 14 L. ed. 705); Ferguson v. Miners & Mfgrs. Bank, 35 Tenn. (3 Sneed, 1856) 609; Davis v. Moore, 130 Ark. (1917) 128, 197 S. W. 295.

Increase of liability of stockholders has generally been sustained under the repeal power. Henley v. Myers, 215 U. S. (1910) 373, 54 L. ed. 240; Barth v. Pock, 51 Mont. (1916) 418, 155 Pac. 282; Davis v. Moore, 130 Ark. (1918) 128, 197 S. W. 295; Pate v. Bank of Newton, 116 Miss. (1918) 666, 77 So. 601; First Nat. Bank v. Multnomah State Bank, 87 Ore. (1918) 423, 170 Pac. 534; Bank of Blytheville v. State, 148 Ark. (1921) 504, 230 S. W. 550; Duke v. Force, 120 Wash. (1922) 599, 208 Pac. 67. An act imposing double liability was upheld on the same ground: Allen v. Scott, 104 Ohio (1922) 436, 135 N. E. 683. See also sec. 151, n. 27-29.

active.[3] Very stringent regulations of insurance companies have been supported under the police power, although in each case the court relied on the theory that, since the insurance company might have been excluded entirely, it could be allowed to write contracts only on hard terms.[4] The New York court upheld, under the repeal power, regulations which were designed to protect creditors of the corporations, but it is difficult to see how this, or any of the other valid regulations of corporations dealing in public credit, could not have been sustained under the police power as well.[5]

§ 148. Public utilities may also be regulated under the general power to make police regulations. The state has broad authority to fix rates under its general police power,[6] and this may also be done under the power to amend the charter.[7] In both cases, as will be seen subse-

[3] In re Oliver Lee & Co.'s Bank, 21 N. Y. (1860) 9.

[4] Thus the state may require a deposit of securities (Paul v. Virginia, 8 Wall. (U. S., 1869) 168, 19 L. ed. 357), may force them to comply with the state laws in detail (Hooper v. People, 155 U. S. (1895) 648, 39 L. ed. 297); may compel them to settle on the basis of the value of the policy rather than on the actual loss (Orient Ins. Co. v. Daggs, 172 U. S. (1899) 557, 43 L. ed. 552); may make policies valid even if erroneous answers were given, if not given fraudulently (John Hancock Mut. Life Ins. Co. v. Warren, 181 U. S. (1900) 73, 45 L. ed. 755; Northwestern Nat. Life Ins. Co. v. Riggs, 203 U. S. (1906) 243, 51 L. ed. 168; can regulate the forfeiture of policies for the non-payment of premiums (N. Y. Life Ins. Co. v. Cravens, 178 U. S. (1900) 389, 44 L. ed. 1116); and can compel an insurance company to file a certificate before writing contracts. Commonwealth v. Hock Age Mut. Ben. Assn., 31 Leg. Int. 245, 10 Phila. (1874) 554. See also Eagle Ins. Co. v. Ohio, 153 U. S. (1894) 446, 38 L. ed. 779.

[5] Hyatt v. McMahon, 25 Barb. (N. Y., 1857) 457.

[6] Beekman v. Saratoga &c. R. Co., 3 Paige (N. Y. Ch., 1831) 45, 22 Am. Dec. 679; Chicago, B. &c. R. Co. v. Iowa, 94 U. S. (1876) 155, 24 L. ed. 94; Railroad Commn. Cases, 116 U. S. (1886) 307, 29 L. ed. 636. This is true even if the power to regulate rates may interfere with certain contracts. Union Dry Goods Co. v. Georgia Pub. Serv. Corp., 248 U. S. (1919) 372, 63 L. ed. 309; Gulf &c. R. Co. v. Adams, 90 Miss. (1907) 559, 45 So. 91; Minneapolis, St. Paul &c. R. Co. v. Menasha Wooden Ware Co., 159 Wis. (1915) 130, 150 N. W. 411; Woodburn v. Public Serv. Commn., 161 Pac. (Ore., 1916) 391; Warsaw v. Pavilion Nat. Gas Co., 195 App. Div. (1921) 624, 187 N. Y. S. 350; United States Smelting, Refin. & Mill. Co. v. Utah Power & L. Co., 58 Utah (1921) 168, 197 Pac. 902.

[7] Dow v. Beidleman, 125 U. S. (1888) 680, 31 L. ed. 841; Lake Shore &c. R. Co. v. Smith, 173 U. S. (1899) 684, 43 L. ed. 858; Louisville &c. R. Co. v. Garrett, 231 U. S. (1913) 298, 58 L. ed. 229; St. Louis &c. R. Co. v.

quently, although the decision regarding the necessity of fixing a rate rests solely upon the legislature, the rate fixed must be a reasonable one.[8] It may be, as was intimated in the Spring Valley Case, that the power to alter the charter strengthens the case for the validity of the

Gill, 54 Ark. (1891) 101, 15 S. W. 18, 11 L. R. A. 452; Saint Louis &c. R. Co. v. Ryan, 56 Ark. (1892) 245, 19 S. W. 839; People ex rel. v. Public Serv. Commn., 153 App. Div. (1912) 129, 138 N. Y. S. 434; Parker v. Metropolitan R. Co., 109 Mass. (1872) 506; Madison, W. &c. Co. v. Reynolds, 3 Wis. (1854) 287; State v. Consolidation Coal Co., 46 Md. (1877) 1; American Coal Co. v. Consolidation Coal Co., 46 Md. (1876) 15; Commonwealth v. Boston &c. St. R. Co., 212 Mass. (1912) 82, 98 N. E. 1075; Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. (1908) 265, 53 L. ed. 176; Pocatello v. Murray, 226 U. S. (1912) 318, 57 L. ed. 239; Southern Pac. Co. v. Campbell, 230 U. S. (1913) 537, 57 L. ed. 1610; Louisville &c. R. Co. v. Garrett, 231 U. S. (1913) 298, 58 L. ed. 229; Milwaukee Elec. R. & L. Co. v. Railroad Commn. of Wis., 238 U. S. (1915) 174, 59 L. ed. 1254; Englewood v. Denver &c. R. Co., 248 U. S. (1919) 294, 63 L. ed. 253; Pawhuska v. Pawhuska Oil & Gas Co., 250 U. S. (1919) 394, 63 L. ed. 1054; Omaha Water Co. v. Omaha, 147 Fed. (1906) 1; Portland Ry., Light & Power Co. v. Portland, 210 Fed. (1914) 667; Southern Bell Tel. & Tel. Co. v. Birmingham, 211 Fed. (1914) 709; Birmingham Waterworks Co. v. Birmingham, 213 Fed. (1914) 450; San Antonio Pub. Serv. Co. v. San Antonio, 257 Fed. (1919) 467; Sumpter Gas & Power Co. v. Sumpter, 283 Fed. (1922) 931; Mobile Gas Co. v. Patterson, 290 Fed. (1923) 476; Bessemer v. Bessemer Waterworks, 152 Ala. (1907) 391, 44 So. 663; Gulf & S. I. R. Co. v. Adams, 90 Miss. (1907) 559, 45 So. 91; People ex rel. v. Public Serv. Commn., 140 App. Div. (1910) 839, 125 N. Y. S. 1000; Arkadelphia Elec. Light Co. v. Arkadelphia, 99 Ark. (1911) 178, 137 S. W. 1093; Dawson v. Dawson Tel. Co., 137 Ga. (1911) 62, 72 S. E. 508; Manitowoc v. Manitowoc &c. Trac. Co., 145 Wis. (1911) 13, 129 N. W. 925; Southwestern T. & T. Co. v. Dallas, 104 Tex. (1911) 114, 134 S. W. 321; Pocatello v. Murray, 21 Idaho (1912) 180, 120 Pac. 812; State v. Superior Court of King County, 67 Wash. (1912) 37, 120 Pac. 861; Benwood v. Public Serv. Commn., 75 W. Va. (1914) 127, 83 S. E. 295; Minneapolis, St. Paul &c. R. Co. v. Menasha Wooden Ware Co., 159 Wis. (1915) 130, 150 N. W. 411; Duluth St. R. Co. v. Railroad Commn., 161 Wis. (1915) 245, 152 N. W. 887; Robertson v. Wilmington & P. Traction Co., 30 Del. (1918) 155, 104 Atl. 839; Sandpoint Water & Light Co. v. Sandpoint, 31 Idaho (1918) 498, 173 Pac. 972; State ex rel. v. Billings Gas Co., 55 Mont. (1918) 102, 173 Pac. 799; Pennsylvania R. Co. v. Gebhardt, 90 N. J. L. (1918) 36, 103 Atl. 694; Portland v. Pub. Serv. Commn., 89 Ore. (1918) 325, 173 Pac. 1178; Black v. New Orleans R. & Light Co., 145 La. (1919) 180, 82 So. 81; Law v. Railroad Commn., 184 Cal. (1920) 737, 195 Pac. 423; State ex rel. v. Burr, 79 Fla. (1920) 290, 84 So. 61; Matter of McAneny, 198 App. Div. (1921) 205, 190 N. Y. S. 92; Public Serv. Commn. v. Pavilion Natural Gas Co., 232 N. Y. (1922) 146, 133 N. E. 427; Victoria v. Victoria Ice, L. & P. Co., 134 Va. (1922) 134, 114 S. E. 92; Richmond v. Virginia R. & P. Co., 141 Va. (1925) 69, 126 S. E. 353. This power is not limited to railroads any more than the police power is so limited. People ex rel. v. Public Serv. Commn., 153 App. Div. (1912) 129, 138 N. Y. S. 434.

[8] Section 150.

power to fix the rates, but it does not appear in just what respect this is true.[9]

Closely connected with the power to fix rates is the problem of granting free transportation under certain circumstances. Congress passed an act providing that the street railroads in the District of Columbia should honor transfers from independent contiguous lines, and this was upheld on the ground that it was both an exercise of the police power and a valid use of the right to alter the articles of incorporation.[10] Laws compelling the granting of free passes for public business to state officials charged with the supervision of the railroads are upheld under the taxing and police powers, as well as under the power to amend the charter of incorporation. When there is no valid public purpose involved; when there is no attempt to prevent corruption by legalizing what had been formerly a semi-bribe; or when the passes may be used regardless of the private character of the journey, the situation is materially altered. This was recognized in the New Jersey court and it was held that since law served no valid public interest it must be declared void.[11]

[9] Spring Valley Water Works v. Schottler, 110 U. S. (1884) 347, 354, 28 L. ed. 173. Still more to the point, however, is Indianapolis v. Navin, 151 Ind. (1898) 139, 47 N. E. 525, 51 N. E. 80, in which it was held that the power of the legislature to regulate the fare on street railroads did not depend upon the repeal clause in the charter of the company. The court declared that the legislature had the same power under the authority to make general police regulations. See also Atlantic &c. R. Co. v. United States, 76 Fed. (1896) 186; Vanceburg & Stouts Lane Tpk. Rd. Co. v. Chesapeake &c. R. Co., 280 Fed. (1922) 482.

Where the rate is fixed as the result of a valid contract between the utility and the city, however, the company can not complain that it is confiscatory, even though the rate agreed to might have been void had it been fixed under the police power. Opelika v. Opelika Sewer Co., 265 U. S. (1924) 215, 68 L. ed. 985.

[10] District of Columbia v. Capital Traction Co., 41 App. D. C. (1913) 115. See also sec. 160, n. 4.

[11] Since "the provision was made to apply to persons to whom such policy had no possible application, it departed from the exercise of its reserved right to regulate railroads for the public good and provided in effect for the taking of the property of such corporation without due process of law. . . .

"If the line be not drawn at the point justified by the public policy in question, I do not see where it can by any principle of law be drawn short of actual confiscation. . . ." Justice Garrison, Delaware, L. &c. R. Co.

This case is especially significant, for it is believed to be the only instance where the courts have declared an act of the legislature void on the principle that the power to amend the charter must be utilized for some public policy. It seems to be the only case in which the close relationship between this power and that of police has been the basis of the decision. Even in this case one might infer from the language of the court that they would be somewhat more liberal in ruling a regulation not in accord with public policy, when such a regulation was made under the repeal power, than would be the case were it solely under the police power.[12] The decision, however, stands alone, and its suggestions, however fruitful they might be, have not been taken up by the other courts.

§ 149. One of the principal reasons for reserving the right to alter their original grants was to be able to force the public utilities to give satisfactory service, and to make such changes in their equipment as would be necessary to secure this. Consequently the Massachusetts court sustained an ordinance compelling the railroads to unite in a union station.[13] Likewise, railroads may be forced

v. Board of Public Utils. Commrs., 85 N. J. L. (1913) 28 at 36, 37, 88 Atl. 849; Pennsylvania R. Co. v. Herrmann, 89 N. J. L. (1916) 582, 99 Atl. 404; Napier v. Delaware, L. &c R. Co., 91 N. J. L. (1917) 282, 102 Atl. 444.

[12] "It is believed that, apart from the police power or some principle of public policy, no court has decided that legislative donations of free transportation are within its reserved right, and if such a decision were found it is difficult to conceive by what principle of law it would be justified." Such cases would certainly violate due process of law. Justice Garrison, Delaware, L. & W. R. Co. v. Board of Public Utils. Commrs., 85 N. J. L. (1913) 28 at 38, 88 Atl. 849. See also Wilson v. United Trac. Co., 72 App. Div. (1902) 233, 76 N. Y. S. 203.

[13] "One of the most obvious reasons for reserving to the legislature the right to alter, amend, or repeal such charters is to enable it to compel an unwilling corporation to perfect and extend its connections with other railroads, as the convenience of the public may from time to time require." Chief Justice Chapman, Worcester v. Norwich, & W. R. Co., 109 Mass. (1871) 103 at 113; Missouri, O. &c. R. Co. v. State, 29 Okla. (1911) 640, 119 Pac. 117.

Other cases in which railroads have been forced to build union stations are: Fort St. Union Depot Co. v. Morton, 83 Mich. (1890) 265, 47 N. W. 228; San Antonio &c. R. Co. v. State, 79 Tex. (1890) 264, 14 S. W. 1063; Corporation Commn. v. Seaboard Air Line R. Co., 161 N. Car.

to build new stations,[14] and to run enough trains to give

(1912) 270, 76 S. E. 554; Railroad Commn. v. Alabama Great So. R. Co., 185 Ala. (1913) 354, 64 So. 13; Railroad Commn. v. Alabama Northern R. Co., 182 Ala. (1913) 357, 62 So. 749; State v. St. Louis Southwestern R. Co., 165 S. W. (Tex. Civ. App., 1913) 491; Gulf, C. & S. F. R. Co. v. State, 167 S. W. (Tex. Civ. App., 1914) 192; State v. St. Louis Southwestern R. Co., 199 S. W. (Tex. Civ. App., 1918) 829. *Contra:* Where the public advantage of the union station is small. Missouri, K. &c. R. Co. v. State, 38 Okla. (1913) 401, 133 Pac. 35.

Under the Esch-Cummings Act of 1920 a State Railroad Commission can not force interstate carriers to unite in a union station at great expense. The Interstate Commerce Commission is the only body having that authority. Railroad Commn. v. Southern Pac. Co., 264 U. S. (1924) 331, 68 L. ed. 713.

[14] Commonwealth v. Eastern R. Co., 103 Mass. (1869) 254, 4 Am. Rep. 555. The power of the state to force railroads to maintain adequate station facilities has been upheld: Norfolk & W. R. Co. v. Public Serv. Commn., 265 U. S. (1924) 70, 68 L. ed. 904; State ex rel. v. Kansas City, Ft. S. &c. R. Co., 32 Fed. (1887) 722; State v. New Haven & Northhampton Co., 37 Conn. (1870) 153; State v. New Haven & Northhampton Co., 43 Conn. (1876) 351; Concord &c. R. R. v. Boston & M. R. R., 67 N. H. (1893) 464, 41 Atl. 263; St. Louis, I. M. &c. R. Co. v. Adcock, 52 Ark. (1899) 406, 12 S. W. 874; People v. Delaware & H. Canal Co., 165 N. Y. (1901) 362, 59 N. E. 138; Morgan's L. & T. R. & S. S. Co. v. Railroad Commn., 109 La. (1902) 247, 33 So. 214; State ex rel. v. Northern Pac. R. Co., 89 Minn. (1903) 363, 95 N. W. 297; State v. Mobile, J. &c. R. Co., 86 Miss. (1905) 172, 38 So. 732; State v. Yazoo &c. R. Co., 87 Miss. (1906) 679, 40 So. 263; Dewey v. Atlantic Coast Line, 142 N. Car. (1906) 392, 55 S. E. 292; Louisiana R. & Nav. Co. v. Railroad Commn., 121 La. (1908) 848, 46 So. 884; Griffin v. Southern R. Co., 150 N. Car. (1909) 312, 64 S. E. 16; Atchison T. & S. F. R. Co. v. State, 23 Okla. (1909) 510, 101 Pac. 262; Railroad Commn. v. Chicago, R. I. &c. R. Co., 102 Tex. (1909) 393, 117 S. W. 794; Pecos &c. R. Co. v. Railroad Commn., 56 Tex. Civ. App. (1909) 422, 120 S. W. 1055; Atchison, T. &c. R. Co. v. State, 27 Okla. (1910) 565, 112 Pac. 1010; State v. Ogden Rapid Trans. Co., 38 Utah (1910) 242, 112 Pac. 120; Horton v. Southern R. Co., 173 Ala. (1911) 231, 55 So. 531; St. Louis Southwestern R. Co. v. State, 97 Ark. (1911) 473, 134 S. W. 970; Horton v. Southern R. Co., 173 Ala. (1911) 231, 55 So. 531; College Arms Hotel Co. v. Atlantic Coast Line, 61 Fla. (1911) 550, 54 So. 459; State v. St. Louis &c. R. Co, 238 Mo. (1911) 605, 142 S. W. 279; Missouri, O. &c. R. Co. v. State, 28 Okla. (1911) 115, 113 Pac. 930; Midland Valley R. Co. v. State, 29 Okla. (1911) 777, 119 Pac. 413; St. Louis & S. F. R. Co. v. Sutton, 29 Okla. (1911) 553, 119 Pac. 423; State v. Great Northern R. Co., 68 Wash. (1912) 257, 123 Pac. 8; Vicksburg, S. &c. P. R. Co. v. Railroad Commn., 132 La. (1913) 193, 61 So. 199; St. Louis, I. M. & S. R. Co. v. Bellamy, 113 Ark. (1914) 384, 169 S. W. 322; State v. Florida E. C. R. Co., 69 Fla. (1915) 165, 67 So. 906; State Pub. Utils. Commn. v. Toledo, St. L. &c. R. Co., 267 Ill. (1915) 93, 107 N. E. 774; Minnesota D. &c. R. Co. v. Way, 34 S. Dak. (1914) 435, 148 N. W. 858; Lusk v. State, 47 Okla. (1915) 648, 150 Pac. 151; People ex rel. v. Public Serv. Commn., 173 App. Div. (1916) 780, 160 N. Y. S. 63; Matter of Public Serv. Commn., 177 App. Div. (1917) 444, 164 N. Y. S. 310; Commercial Club of St. James v. Chicago, St. Paul M. &c. R. Co., 142 Minn. (1918) 169, 171 N. W. 312; Corporation Commn. v. Southern

adequate service.[15] It is significant that under the general police power, the legislature may make exactly the same kind of regulations of service,[16] and under the repeal power the legislature, as limited by due process of law, can only make regulations which are incidental to the general purpose of incorporation as set forth in the charter.[17] In each of these cases, furthermore, the public

R. Co., 185 N. Car. (1923) 435, 117 S. E. 563; Mosel v. San Antonio &c. R. Co., 249 S. W. (Tex. Civ. App., 1923) 893.

There are cases, however, in which the public advantage was so small that the order to build or remove a station was declared void. State ex rel. v. Minneapolis &c. R. Co., 76 Minn. (1899) 469, 79 N. W. 510; Louisiana &c. R. Co. v. State, 91 Ark. (1909) 358, 121 S. W. 284; State v. Railroad Commn., 60 Wash. (1910) 218, 110 Pac. 1075; St. Louis Southwestern R. Co. v. State, 97 Ark. (1911) 473, 134 S. W. 970; St. Louis, I. M. &c. R. Co. v. State, 31 Okla. (1912) 509, 122 Pac. 217; Seward v. Denver &c. R. Co., 17 N. Mex. (1913) 557, 131 Pac. 980, 46 L. R. A. (N. S.) 242.

[15] Missouri Pac. R. Co. v. Kansas ex rel., 216 U. S. (1909) 262, 54 L. ed. 472. On the power to force railroads to maintain adequate train service see: State v. Missouri Pac. R. Co., 216 U. S. (1907) 262, 54 L. ed. 492; Chesapeake & O. R. Co. v. Public Serv. Commn., 242 U. S. (1917) 603, 61 L. ed. 520; Mississippi Railroad Commn. v. Mobile &c. R. Co., 244 U. S. (1917) 388, 61 L. ed. 1216; Commonwealth v. Louisville &c. R. Co., 112 Ky. (1902) 783, 66 S. W. 753, 23 Ky. L. 1986; Railroad Commn. v. Chicago, R. I. &c. R. Co., 102 Tex. (1909) 393, 117 S. W. 794; Missouri K. &c. R. Co. v. Witcher, 25 Okla. (1910) 586, 106 Pac. 852; St. Louis &c. R. Co. v. Troy, 25 Okla. (1910) 749, 108 Pac. 753; State ex rel. v. Ogden Rapid Trans. Co., 38 Utah (1910) 242, 112 Pac. 120; State v. Railroad Commn., 60 Wash. (1910) 218, 110 Pac. 1075; State v. Atlantic Coast Line R. Co., 60 Fla. (1911) 465, 54 So. 394; Atchison T. &c. R. Co. v. Miller, 28 Okla. (1911) 109, 114 Pac. 1104; State v. Louisville &c. R. Co., 62 Fla. (1912) 315, 57 So. 175; Colorado & S. R. Co. v. State Railroad Commn., 54 Colo. (1913) 64, 129 Pac. 506; Adena R. Co. v. Public Serv. Commn., 92 Ohio St. (1915) 1, 110 N. E. 631; Hocking Valley R. Co. v. Public Utils. Commn., 92 Ohio St. (1915) 9, 110 N. E. 521, 1061, L. R. A. 1918A, 267, Ann. Cas. 1917B, 1154.

Under the same reasoning the speed and frequency of street cars may be regulated. Tacoma v. Boutelle, 61 Wash. (1911) 434, 112 Pac. 661.

But even under the repeal power a railroad can not be forced to run more trains than are necessary for reasonable service. Washington P. &c. R. Co. v. Magruder, 198 Fed. (1912) 218. See also: Delaware L. &c. R. Co. v. Van Santwood, 216 Fed. (1914) 252; Railroad Commn. v. Saline River R. Co., 119 Ark. (1915) 239, 177 S. W. 896; Railroad Commn. v. St. Louis &c. R. Co., 195 Ala. (1916) 527, 70 So. 645.

[16] Ernst Freund, Police Power (Chicago, 1904) sec. 397.

[17] Metropolitan R. Co. v. Macfarland, 20 App. D. C. (1902) 421; affirmed, 195 U. S. (1904) 322, 49 L. ed. 219.

It is possible that the power in regard to service requirements may be greater than that in respect to rates. People ex rel. v. Public Serv. Commn., 46 Sup. Ct. (1925) 83.

benefit derived from the exercise of the legislative power was obvious.[18]

It is in consideration of this public benefit that railroads may be compelled to make certain public improvements. Under the repeal provision of the charter a street railroad can be forced to pave the street for a foot on each side of its tracks, when the original charter only required them to pave between the rails.[19] The same rule

[18] See Wilson v. United Tract. Co., 72 App. Div. (1902) 233, 76 N. Y. S. 203. Note, however, that the New York court in People v. Beakes Dairy Co., 222 N. Y. (1918) 416, 119 N. E. 115, put the decision supporting regulations of the milk business, exclusively on the repeal power and intimated that the police power did not cover the case. There seems no good reason, however, why licensing and inspecting of dairies may not be done under the latter power.

[19] The state "reserved the power to determine the question of the exemption of the company from taxation, and to prescribe what burdens should be imposed upon it for the public good, in the enjoyment of its franchise." Justice Blatchford, Sioux City St. R. Co. v. Sioux City, 138 U. S. (1891) 98 at 107, 108, 34 L. ed. 898; Mechanicville v. Stillwater &c. R. Co., 174 N. Y. (1903) 507, 66 N. E. 1117. *Contra:* Shreveport v. Shereveport Belt R. Co., 107 La. (1902) 785, 32 So. 189; Durham v. Durham Pub. Serv. Co., 182 N. Car. (1921) 333, 109 S. E. 40.

On the general power of a city to force the street railways to bear their proportion of the paving expenses see: Rochester R. Co. v. Rochester, 205 U. S. (1907) 236, 51 L. ed. 784; Southern Wisconsin R. Co. v. Madison, 240 U. S. (1916) 457, 60 L. ed. 739; District of Columbia v. Washington &c. R. Co., 4 Mackey (15 D. C., 1885) 214; District of Columbia v. Metropolitan R. Co., 8 App. D. C. (1896) 322; Union St. R. Co. v. Saginaw Circ. Judge, 113 Mich. (1897) 694, 71 N. W. 1073; Burckhardt v. Atlanta, 103 Ga. (1898) 302, 30 S. E. 32; Storrie v. Houston City St. R. Co., 92 Tex. (1898) 129, 46 S. W. 796; Wood v. Common Council of Binghamton, 56 N. Y. S. (1899) 105; West Chester v. West Chester St. R. Co., 203 Pa. (1902) 201, 52 Atl. 252; In re Topping Ave., 187 Mo. (1905) 146, 86 S. W. 190; Uhlich's Estate v. Chicago, 224 Ill. (1906) 402, 79 N. E. 598; Trenton v. Trenton St. R. Co., 72 N. J. L. (1906) 317, 63 Atl. 1; Rutherford v. Hudson River T. Co., 73 N. J. L. (1906) 227, 63 Atl. 84; McKeesport v. Pittsburg, M. &c. R., 213 Pa. (1906) 542, 62 Atl. 1075; Madison v. Alton, G. & St. L. T. Co., 235 Ill. (1908) 346, 85 N. E. 596; Niles v. Benton Harbor-St. Joe R. & L. Co., 154 Mich. (1908) 378, 117 N. W. 937; Oklahoma City v. Shields, 22 Okla. (1908) 265, 100 Pac. 559; Indianapolis &c. R. Co. v. New Castle, 43 Ind. App. (1909) 467; Des Moines City R. v. Des Moines, 152 Iowa (1911) 18, 131 N. W. 43; Southern Bitulithic Co. v. Algiers R. &c. Co., 130 La. (1912) 830, 58 So. 588; Detroit v. Detroit United R., 172 Mich. (1912) 496, 138 N. W. 215; Norfolk & P. Tract. Co. v. Norfolk, 115 Va. (1913) 169, 78 S. E. 545; Anna v. Northern, 261 Ill. (1914) 538, 104 N. E. 171; Lincoln v. Chicago &c. R. Co. 262 Ill. (1914) 11, 104 N. E. 277; Orange County, T. Co. v. Newburgh, 86 Misc. (1914) 512, 149 N. Y. S. 1; State ex rel. v. Milwaukee Elec. R. &c. Co., 157 Wis. (1914) 121, 147 N. W. 232; Cedar Rapids &c. R. Co. v. Cedar Rapids, 180 Iowa (1917) 567, 163 N. W. 387; Henderson T. Co. v. Henderson, 178 Ky. (1917) 124, 198 S.

enables the legislature to force the railroad to bear its proportionate share of grade crossings, according to the Massachusetts court,[20] and a similar law was upheld in New York in spite of the strenuous objections of the Supreme Court.[21] These corporations also may be forced

W. 730; State v. Milwaukee Elec. R. &c. Co., 165 Wis. (1917) 230, 161 N. W. 745; South Park Commrs. v. Chicago City R. Co., 286 Ill. (1919) 504, 122 N. E. 89; Mount Vernon v. Berman, 100 Ohio St. (1919) 1, 125 N. E. 116; Burlington R. &c. Co. v. Burlington, 188 Iowa (1919) 272, 176 N. W. 285; Raleigh v. Carolina P. &c. Co., 180 N. Car. (1920) 234, 104 S. E. 462; Merchantville v. Camden &c. R. Co., 95 N. J. L. (1921) 511, 113 Atl. 136; Henderson v. Henderson T. Co., 200 Ky. (1923) 183, 254 S. W. 332; Grandville v. Grand Rapids, H. &c. R., 255 Mich. (1923) 587, 196 N. W. 351; Common Council of Frankfort v. Morris, 201 Ky. (1924) 449, 257 S. W. 16; Alabama Trac. Co. v. Selma T. & S. Bank, 104 So. (Ala., 1925) 517; some courts hold that the railroad may be forced to pave with a certain type of material. Mechanicville v. Stillwater & M. St. R. Co., 174 N. Y. (1903) 507, 66 N. E. 1107; New York City v. Harlem Bridge, M. &c. R. Co., 186 N. Y. (1906) 304, 78 N. E. 1072. *Contra:* Madison v. Alton, G. & St. L. T. Co., 235 Ill. (1908) 346, 85 N. E. 596; Philadelphia v. Empire Pass. R. Co., 3 Brewst. (Pa., 1869) 570. The railroad may be forced to repave its right of way. Philadelphia v. Ridge Ave. Pass. R. Co., 143 Pa. (1891) 444; Lansing v. Lansing City Elec. R. Co., 109 Mich. (1896) 123. An order to repave which was clearly arbitrary, however, was held void: Chicago v. Chicago Rs. Co., 282 Ill. (1918) 383, 118 N. E. 728. See also: Atlanta Consol. St. R. Co. v. Atlanta, 111 Ga. (1900) 255, 36 S. E. 667. See also p. 429, n. 5.

The power to force the railroad to pave its right of way may be supported on the theory that the presence of the rails injures the street for regular vehicular traffic. Fair Haven & W. R. Co. v. New Haven, 203 U. S. (1906) 379, 51 L. ed. 237; St. Helena v. San Francisco, N. &c. R. Co., 24 Cal. App. (1914) 71, 140 Pac. 600, 605; Cleburne St. R. Co. v. Dickey, 168 S. W. (Tex. Civ. App., 1914) 475.

[20] Fitchburg R. Co. v. Grand Junction R. &c. Co., 4 Allen (Mass., 1862) 198.

[21] The statute forced the railroad to construct a road across its tracks and make the necessary embankments. "If such arrangements were necessary for the safety of the passengers or the freight conveyed on the cars, they might doubtless be required of the companies, although not contemplated when they were organized." However, "the power reserved to the legislature to alter, modify or repeal the defendants' charter, did not purport to authorize the assumption of their property without compensation. No power to do that could have been reserved, for none such could have existed." Justice Strong, Miller v. New York &c. R. Co., 21 Barb. (N. Y., 1856) 513 at 518, 519. Overruled, Albany N. R. Co. v. Brownell, 24 N. Y. (1862) 345 at 351. See also Thorpe v. Rutland R. Co., 27 Vt. (1854) 140, 62 Am. Dec. 625.

The power to force railroads to maintain crossings has been upheld in a large number of cases. Chicago B. &c. R. v. Drainage Commrs., 200 U. S. (1906) 561, 50 L. ed. 596; Wellcome v. Leeds, 51 Maine (1862) 313; State v. Dayton &c. R. Co., 36 Ohio St. (1881) 434; Newark v. Delaware, L. &c. R. Co., 42 N. J. Eq. (1886) 196, 7 Atl. 123; Kyne v. Wilmington &c. R. Co., 8 Houst. (Del. 1888) 185, 14 Atl. 922; State v. Minneapolis &c. R. Co., 39 Minn. (1888) 219, 39 N. W. 153; Evansville & T. H. R. Co. v. State,

149 Ind. (1898) 276, 49 N. E. 2; Wayzata v. Great Northern R. Co., 50 Minn. (1892) 438, 52 N. W. 913; Tobias v. Michigan Cent. R. Co., 103 Mich. (1894) 330, 61 N. W. 514; State v. Minnesota T. R. Co., 80 Minn. (1900) 108, 83 N. W. 32, 50 L. R. A. 656; Independence v. Missouri Pac. R. Co., 86 Mo. App. (1901) 585; Elyria v. Lake Shore &c. R. Co., 23 Ohio Cir. Ct. (1902) 482; Clarendon v. Rutland R. Co., 75 Vt. (1902) 6, 52 Atl. 1057; See v. Wabash R. Co., 123 Iowa (1904) 443; International &c. R. Co. v. Haddox, 36 Tex. Civ. App. (1904) 385, 81 S. W. 1036; Hughes v. Arkansas &c. R. Co., 74 Ark. (1905) 194, 85 S. W. 773; St. Louis S. W. R. Co. v. Johnson, 38 Tex. Civ. App. (1905) 322, 85 S. W. 476; St. Louis I. M. &c. R. v. State, 88 Ark. (1908) 338, 114 S. W. 703; Sample v. Chicago B. &c. R. Co., 233 Ill. (1908) 564, 84 N. E. 643; Hall v. Houston &c. R. Co., 52 Tex. Civ. App. (1908) 90, 114 S. W. 891; Illinois Central R. Co. v. Commonwealth, 138 Ky. (1910) 742, 129 S. W. 94; Chicago &c. R. Co. v. Luddington, 175 Ind. (1910) 35, 91 N. E. 939, 93 N. E. 273; Phoenix Mut. L. I. Co. v. Lincoln, 91 Nebr. (1912) 150, 135 N. W. 445; State v. Atlantic &c. R. Co., 164 N. Car. (1913) 422, 79 S. E. 447; Cincinnati, N. O. &c. R. Co. v. Dungan, 162 Ky. (1915) 36, 171 S. W. 1007; Davis v. Twin Mountain &c. R. Co., 77 W. Va. (1915) 400, 87 S. W. 544; Iola v. Missouri Pac. R. Co., 97 Kans. (1916) 242, 155 Pac. 45; Jones v. Tremont Lumber Co., 139 La. (1916) 616, 71 So. 862; State ex rel. v. Great Northern R. Co., 136 Minn. (1917) 164, 161 S. W. 506; Louisville &c. R. Co. v. Covington, 184 Ky. (1919) 811, 213 S. W. 568; Bullock v. Yakima Valley Transp. Co., 108 Wash. (1919) 413, 184 Pac. 641, 187 Pac. 410; Milwaukee v. Chicago, M. &c. R. Co., 168 Wis. (1919) 534, 171 N. W. 54; State v. Chicago, St. P. M. &c. R. Co., 148 Minn. (1920) 91, 180 N. W. 925; De-Funiak Springs v. Louisville &c. R. Co., 81 Fla. (1920) 27, 87 So. 47; Mixon v. Savannah &c. R., 28 Ga. App. (1922) 390, 111 S. E. 197, 690; State v. Chicago, M. &c. R. Co., 182 Wis. (1924) 605, 197 N. W. 247. The same rule is applied regardless whether the road antedated the railroad or not. Northern Pac. R. Co. v. Minnesota ex rel., 208 U. S. (1908) 583, 52 L. ed. 630; Cincinnati, I. &c. R. Co. v. Connersville, 218 U. S. (1910) 336, 54 L. ed. 1060; Chicago, B. &c. R. Co. v. Board of Supervisors of Appanoose County, 182 Fed. (1910) 291; Scanlan v. Boston, 140 Mass. (1885) 84, 2 N. E. 787; State v. Shardlow, 43 Minn. (1890) 524, 46 N. W. 74; State v. Chicago, B. &c. R. Co., 29 Nebr. (1890) 412, 45 N. W. 469; New York &c. R. Co. v. Waterbury, 60 Conn. (1891) 1, 22 Atl. 439; Peterson v. New Pittsburg Coal &c. Co., 149 Ind. (1898) 260, 49 N. E. 8; Rochester &c. R. Co. v. Rochester, 163 N. Y. (1900) 608, 57 N. E. 1123; Baltimore &c. R. Co. v. State ex rel., 159 Ind. (1902) 510, 65 N. E. 508; Illinois Central R. Co. v. Copiah County, 81 Miss. (1903) 685, 33 So. 502; Harriman v. Southern R. Co., 111 Tenn. (1904) 538, 82 S. W. 213; Houston &c. R. Co. v. Dallas, 98 Tex. (1905) 396, 84 S. W. 648; State v. St. Paul M. &c. R. Co., 98 Minn. (1906) 380, 108 N. W. 261; New York, C. &c. R. Co. v. Rhodes, 171 Ind. (1909) 521, 86 N. E. 840; Chicago, M. &c. R. Co. v. Le Roy, 124 Minn. (1913) 107, 144 N. W. 464; Omaha, L. &c. R. Co. v. Lincoln, 97 Nebr. (1914) 122, 149 N. W. 319; State ex rel. v. Atchison, T. &c. R. Co., 95 Kans. (1915) 22, 147 Pac. 801; Supervisors of Tazewell County v. Norfolk &c. R. Co., 119 Va. (1916) 763, 91 S. E. 124; Waterbury v. Chicago, M. St. P. R. Co., 207 Ill. App. (1917) 375; Chicago R. I. & P. R. Co. v. Taylor, 79 Okla. (1920) 142, 192 Pac. 349; St. Paul v. Minnesota Trans. R. Co., 155 Minn. (1923) 237, 193 N. W. 175. Under the common law a railroad was only liable for the maintenance of the crossing where it was built subsequently to the road. Paducah &c. R. Co. v. Commonwealth, 80 Ky. (1882) 147; Albia v. Chicago, B. &c. R. Co., 102 Iowa (1897)

624, 71 N. W. 541; Missouri Pac. R. Co. v. Cass County, 76 Nebr. (1906) 396, 107 N. W. 773; Waterbury v. Chicago M. &c. R. Co., 207 Ill. App. (1918) 375. The Kentucky court has held that the railroad may not be forced to change its grade to conform to that of a street subsequently laid out. Louisville &c. R. Co. v. Louisville, 122 S. W. (Ky. App., 1909) 849.

Similar reasoning justifies the cases in which it has been held that a railroad could be forced to bear the expenses of abolishing grade crossings. "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks or to carry their tracks over such highways." Chicago, M. &c. R. Co. v. Minneapolis, 232 U. S. (1914) 430 at 438, 58 L. ed. 671; New York &c. R. Co. v. Bristol, 151 U. S. (1894) 556, 38 L. ed. 269; Chicago B. &c. R. Co. v. Nebraska, 170 U. S. (1898) 57, 42 L. ed. 948; Cincinnati, I. &c. R. Co. v. Connersville, 218 U. S. (1910) 336, 54 L. ed. 1060; Chicago, M. &c. R. Co. v. Minneapolis, 232 U. S. (1914) 430, 58 L. ed. 671; Missouri Pac. R. Co. v. Omaha, 235 U. S. (1914) 121, 59 L. ed. 157; Chicago M. &c. R. Co. v. Minneapolis, 238 Fed. (1917) 384; People ex rel. v. Boston &c. R. Co., 70 N. Y. (1877) 569; State v. Missouri Pac. R. Co., 33 Kans. (1885) 176, 5 Pac. 772; Woodruff v. Catlin, 54 Conn. (1886) 277, 6 Atl. 849; State v. Minneapolis &c. R. Co., 39 Minn. (1888) 219, 39 N. W. 153; Woodruff v. New York &c. R. Co., 59 Conn. (1890) 63, 20 Atl. 17; People v. Union Pac. R. Co., 20 Colo. (1894) 186; Chicago, B. &c. R. Co. v. State, 47 Nebr. (1896) 549, 66 N. W. 624; Osburn v. Chicago, 105 Ill. App. (1902) 217; State v. Indianapolis Union R. Co., 160 Ind. (1903) 45, 66 N. E. 163; Swift v. Delaware, L. &c. R. Co., 66 N. J. Eq. (1904) 452, 58 Atl. 939; Cowles v. New York, N. H. & H. R. Co., 80 Conn. (1907) 48, 66 Atl. 1020; In re Detroit, 163 Mich. (1910) 229, 128 N. W. 250; St. Louis v. St. Louis &c. R. Co., 228 Mo. (1910) 712, 129 S. W. 691; Morris v. Indianapolis, 177 Ind. (1911) 369, 94 N. E. 705; Sullivan v. Boston &c. R., 210 Mass. (1911) 229, 96 N. E. 347; Minneapolis v. Minneapolis St. R. Co., 115 Minn. (1911) 514, 133 N. W. 80; American Tobacco Co. v. Missouri Pac. R. Co., 247 Mo. (1912) 374, 157 S. W. 502; Louisville &c. R. Co. v. Hopkins, 153 Ky. (1913) 718, 156 S. W. 379; State v. Chicago M. &c. R. Co., 122 Minn. (1913) 280, 142 N. W. 312; State v. Union Pac. R. Co., 94 Nebr. (1913) 556, 143 N. W. 918; Chattanooga v. Southern R. Co., 128 Tenn. (1913) 399, 161 S. W. 1000; Spokane v. Spokane &c. R. Co., 75 Wash. (1913) 651, 135 Pac. 636; Superior v. Roemer, 154 Wis. (1913) 345, 141 N. W. 250; Polk v. Railroad Commn., 154 Wis. (1913) 523, 143 N. W. 191; Otis Elev. Co. v. Chicago, 263 Ill. (1914) 419, 105 N. E. 338; People ex rel. v. Purdy, 149 N. Y. S. (1914) 315; Detamore v. Hindley, 83 Wash. (1915) 322, 145 Pac. 462; McCutcheon v. Terminal Station Commn., 217 N. Y. (1916) 127, 111 N. E. 661; Lord v. Chicago, 274 Ill. (1917) 313, 113 N. E. 597; State v. Chicago M. &c. R. Co., 135 Minn. (1917) 277, 160 N. W. 773; People ex rel. v. Public Serv. Commn., 220 N. Y. (1917) 1, 114 N. E. 1050; Chesapeake &c. R. Co. v. Dayton, 177 Ky. (1918) 502, 197 S. W. 969; St. Paul v. Chicago, St. P. M. &c. R. Co., 139 Minn. (1918) 322, 166 N. W. 335; Chicago, M. &c. R. Co. v. Lake County, 287 Ill. (1919) 337, 122 N. E. 526. Application of Kaiser, 171 Wis. (1919) 40, 174 N. W. 714, 176 N. W. 781; Erie R. Co. v. Public Serv. Commn., 271 Pa. (1921) 409, 114 Atl. 357; Gulf C. &c. R. Co. v. Louisiana Pub. Serv. Commn., 151 La. (1922) 635, 92 So. 143; Commerce Commn. ex rel. v. Cleveland, C. C. &c. R. Co., 309 Ill. (1923) 165, 140 N. E. 868; Durham v. Southern R. Co., 185 N. Car. (1923) 240, 117 S. E. 17; Knoxville v. Southern R. Co., 149 Tenn. (1924) 291, 258 S. W. 143; State ex rel. v. Northern Pac. R. Co., 128 Wash. (1924)

to adequately protect grade crossings,[22] and to widen

73, 221 Pac. 991; North Dakota State Highway Commn. v. Great Northern R. Co., 200 N. W. (N. Dak., 1924) 796; Pearson v. Twohy Bros. Co., 231 Pac. (Ore., 1925) 129; Chicago M. &c. R. Co. v. Railroad Commn., 204 N. W. (Wis. 1925) 606. Nor is it material whether the road was laid out before the railroad or not in these cases. Erie R. Co. v. Board of Public Util. Commrs., 254 U. S. (1921) 394, 65 L. ed. 322; Illinois Cent. R. Co. v. Swalm, 83 Miss. (1904) 631, 36 So. 147; Chicago v. Pittsburg, C. C. &c. R. Co., 242 Ill. (1909) 30, 89 N. E. 648; West Jersey &c. R. Co. v. Woodbury, 80 N. J. Eq. (1912) 412, 84 Atl. 1047; Pittsburgh &c. R. Co. v. Butler, 242 Pa. (1913) 461, 89 Atl. 579; Newport v. Louisville, &c. R. Co., 174 Ky. (1917) 799, 192 S. W. 838; State ex rel. v. Public Serv. Commn., 272 S. W. (Mo., 1925) 957. *Contra:* Louisville &c. R. Co. v. Hopkins County, 153 Ky. (1913) 718, 156 S. W. 379. In at least two cases it has been held that an order to abolish a grade crossing which was not actually dangerous was void as being unreasonable. Newark v. Central R. Co., 73 N. J. Eq. (1907) 469, 67 Atl. 1009; Newark v. Erie R. Co., 76 N. J. Eq. (1909) 317, 74 Atl. 505. See also the implication in State ex rel. v. Public Serv. Commn., 306 Mo. (1925) 149, 267 S. W. 102.

[22] Great Northern R. Co. v. Minnesota, 246 U. S. (1918) 434, 62 L. ed. 4; Northern Pac. R. Co. v. Puget Sound & W. H. R. Co., 250 U. S. (1919) 332, 63 L. ed. 1013; Bulkley v. New York &c. R. Co., 27 Conn. (1858) 479. This protection may include the giving of proper signals, providing automatic bells, gates, etc., or the maintenance of watchmen at the crossings. Suydam v. Moore, 8 Barb. (N. Y., 1850) 358; Delaware, L. &c. R. Co. v. East Orange, 41 N. J. L. (1879) 127; Concord &c. R. R. v. Portsmouth, 64 N. H. (1886) 218, 219, 9 Atl. 546; Kaminitsky v. Northeastern R. Co., 25 S. Car. (1886) 53; Denver &c. R. Co. v. Ryan, 17 Colo. (1891) 98, 28 Pac. 79; Ohio &c. R. Co. v. Reed, 40 Ill. App. (1891) 47; Green v. Eastern R. Co. of Minnesota, 52 Minn. (1892) 79, 53 N. W. 808; Boston &c. R. Co. v. Cambridge, 159 Mass. (1893) 283, 34 N. E. 382; In re Highway Commrs., 74 Hun (1893) 44, 26 N. Y. S. 384; In re Patchogue Street Crossings, 74 Hun (1893) 46, 26 N. Y. S. 293; State Board of Education v. Mobile &c. R. Co., 72 Miss. (1894) 236, 16 So. 489; Chicago, M. &c. R. Co. v. Milwaukee, 97 Wis. (1897) 418, 72 N. W. 1118; West Jersey &c. R. Co. v. Bridgeton, 64 N. J. L. (1899) 189, 44 Atl. 848; Chesapeake &c. R. Co. v. Maysville, 24 Ky. L. (1902) 615, 69 S. W. 728; Eckert v. Perth Amboy &c. R. Co., 65 N. J. Eq. (1904) 777, 57 Atl. 438, 66 N. J. Eq. (1904) 437, 57 Atl. 438; Central R. Co. v. Elizabeth, 70 N. J. L. (1904) 578, 57 Atl. 404; Seibert v. Missouri Pac. R. Co., 188 Mo. (1905) 657, 87 S. W. 995; In re Pennsylvania R. Co., 27 Pa. Super. Ct. (1905) 113; Chicago &c. R. Co. v. Averill, 224 Ill. (1906) 516, 79 N. E. 654; Commissioners of Prince George's County v. Baltimore &c. R. Co., 113 Md. (1910) 179, 77 Atl. 433; St. Louis &c. R. Co. v. Lewis, 28 Okla. (1911) 453, 114 Pac. 702; State ex rel. v. Great Northern R. Co., 114 Minn. (1911) 293, 131 N. W. 330; Rosenthal v. Chicago &c. R. Co., 255 Ill. (1912) 552, 99 N. E. 672; Council Bluffs v. Illinois Cent. R. Co., 158 Iowa (1912) 679, 138 N. W. 891; People ex rel. v. Bradley, 207 N. Y. (1913) 592, 101 N. E. 766; Sabre v. Rutland R. Co., 86 Vt. (1913) 347, 85 Atl. 693; Jorgenson v. Chicago &c. R. Co., 153 Wis. (1913) 108, 140 N. W. 1088; Richards v. Southern R. Co., 97 S. Car. (1914) 77, 81 S. E. 314; Norfolk &c. R. Co. v. Bristol, 116 Va. (1914) 955, 83 S. E. 421; St. Louis &c. R. Co. v. Hart, 45 Okla. (1915) 659, 146 Pac. 436; Waxahachie v. Missouri, K. &c. R. Co., 183 S. W. (Tex. Civ. App., 1916) 61; Jay v. Northern Pac. R. Co., 162 Wis. (1916) 458, 156 N. W. 626; Erie

their bridges as the towns along the line grow in population.[23]

§ 150. The whole question of improvements for the public benefit was recently considered by the Federal Supreme Court in the International Bridge Company Case. Under the power to amend the charter, the legislature sought to force the bridge company to add a foot-bridge to its structure. The statute was upheld, partly because the charter could be altered for the public benefit, but largely because a foot-bridge had been contemplated, in permissive words, in the original charter, and was hence within the general scope of the grant.[24] Furthermore, it was not shown that the addition would not yield a reasonable return on the investment. Justice Holmes, however, suggested, although it was not material to the decision, that a reasonable return on the improvement might not be requisite if the company were ordered to make it under the amending power.[25] This leaves the law in a

R. Co. v. Board of Pub. Util. Commrs., 90 N. J. L. (1917) 271, 100 Atl. 346; Franklin Grove v. Chicago &c. R. Co., 196 Ill. App. (1915) 167; Chillicothe Rd. Co. v. Norfolk &c. R. Co., 5 Ohio App. (1916) 151; Hurt v. Yazoo &c. R. Co., 140 Tenn. (1918) 623, 205 S. W. 437; Johnston v. Johnston &c. R. Co., 75 Pa. Super. Ct. (1921) 540; Municipal Officers of Newport v. Maine Cent. R. Co., 123 Maine (1924) 383, 123 Atl. 172. But see: Dwyer v. Chicago &c. R. Co., 40 S. Dak. (1918) 84, 166 N. W. 237; Union Bridge Co. v. United States, 204 U. S. (1906) 364, 51 L. ed. 523; Chicago M. &c. R. Co. v. Minneapolis, 232 U. S. (1914) 430, 58 L ed. 671; Acworth v. Western &c. R. Co., 159 Ga. (1925) 610, 126 S. E. 454. In several cases of this class, however, the courts have held the order to maintain watchmen void because there was no corresponding public benefit. Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. (1873) 37, 16 Am. Rep. 611; McCullough v. Franklin, 59 N. J. L. (1896) 106, 34 Atl. 1088; New York &c. R. Co. v. Bloomfield Tp., 59 N. J. L. (1896) 109, 35 Atl. 158; Commonwealth v. Philadelphia, H. &c. R. Co., 23 Pa. Super. Ct. (1903) 205; Southern Indiana R. Co. v. Bedford, 165 Ind. (1905) 272, 75 N. E. 268. For cases involving the power of the legislature to force railroads to provide cattle guards see p. 426.

[23] English v. New Haven & N. Co., 32 Conn. (1864) 240. See also: Missouri Pac. R. Co. v. Omaha, 235 U. S. (1914) 121, 59 L. ed. 157.

[24] International Bridge Co. v. New York, 254 U. S. (1920) 126, 65 L. ed. 176. Not unlike this situation is the one in Sears v. Akron, 246 U. S. (1918) 242, in which an amendment to the charter of a water power company, to enable the city to use water from the same stream was upheld. The court pointed out that there was no contract right involving the amount of the water in the stream.

[25] "The only question now before us is whether the additions shall be

rather unsatisfactory situation, but it is easy to see why the court should hesitate to commit itself to a doctrine that would seriously cripple the reserved power. If the restraints of the law of the land should be applied to it as they have been to the police power, it might become very difficult to distinguish between them. That some courts have felt the necessity of some such limitation as this is exceedingly significant as showing the close relation which exists between due process of law and the inherent desire of the courts to protect private rights from unreasonable and tyrannical governmental action. This is especially evident in those cases in which the rights have been legitimately vested by previous action of the legislature.[26]

§ 151. Because of the peculiar nature of corporations, they are liable to abuses from which natural persons are free. The very fact that the stockholders have limited liability opens the door, if not to actual fraud, to a considerable abuse of their power to secure credit. Because of the peculiar nature of a banking corporation, its charter may be amended to increase the liability of the stockholders,[27] or to provide for a more expeditious enforcement

built. As to that it would be going very far in the way of limiting the reserved right to amend such charters, if it should be held that the state had not the power to require what originally was contemplated in permissive words as part of the scheme. . . .

"As we agree with the Court of Appeals that this amendment to the charter was within the power reserved to the state the objection under the contract clause of the constitution of course must fail, and, it would seem, that under the Fourteenth Amendment also. But as to the latter we may add, as the Court of Appeals added, that there is nothing to show that the addition to the structure will not yield a reasonable return; if that be essential in view of the charter." Justice Holmes, International Bridge Co. v. New York, 254 U. S. (1920) 126 at 130, 131, 65 L. ed. 176.

[26] Even in those cases where the corporation has injured the public rights, as in building dams in rivers and preventing fish from going back and forth, the courts, although invariably upholding the right of the legislature in forcing the corporation to put in a fish-way, have intimated that they would have required as much under either the police power (Commission on Inland Fisheries v. Holyoke Power Co., 104 Mass. (1870) 446, 6 Am. Rep. 247), or under the implied obligation on the part of the corporation to repay for the damage they may do to the public rights. Holyoke Company v. Lyman, 15 Wall. (U. S., 1872) 500 at 519, 21 L. ed. 133. The same general logic applied to the building of locks around a dam. Meadow Dam Co. v. Gray, 30 Maine (1849) 547.

[27] In re Oliver Lee & Co.'s Bank, 21 N. Y. (1860) 9; In re Reciprocity

of the existing liability,[28] and the legislature, under the reserved power, can impose liability upon either the stockholders or directors where none existed formerly.[29] In all of these cases, however, a distinct public purpose was served by the alteration. Where such is not the case, as in an amendment to permit two-thirds of the stockholders to change the assessability of the stock, the law is of questionable validity.[30]

Bank, 22 N. Y. (1860) 9; Sherman v. Smith, 1 Black (U. S., 1861) 587, 17 L. ed. 163; Owen v. Purdy, 12 Ohio St. (1861) 73; McGowan v. McDonald, 111 Cal. (1896) 57, 43 Pac. 418, 52 Am. St. 149; Hagmayer v. Farley, 23 App. Div. (1897) 426, 48 N. Y. S. 336; Hirshfeld v. Fitzgerald, 157 N. Y. (1898) 166, 51 N. E. 997, 46 L. R. A. 839; Barnes v. Arnold, 23 Misc. (1898) 197, 51 N. Y. S. 1109; Foster v. Broas, 120 Mich. (1899) 1, 79 N. W. 696, 77 Am. St. 565; Smathers v. Western Carolina Bank, 135 N. Car. (1904) 410, 47 S. E. 893; Lamar v. Taylor, 141 Ga. (1914) 227, 80 S. E. 1085; Barth v. Pock, 51 Mont. (1916) 418, 155 Pac. 282; Norris Safe & Lock Co. v. Weaver, 81 Ore. (1916) 670, 160 Pac. 807; Davis v. Moore, 130 Ark. (1917) 128, 197 S. W. 295; Bank of Blytheville v. State, 148 Ark. (1920) 504, 230 S. W. 550; Bennett v. Wheatley, 154 Ga. (1922) 591, 115 S. E. 83; Allen v. Scott, 104 Ohio (1922) 436, 135 N. E. 683; Duke v. Force, 120 Wash. (1922) 599, 208 Pac. 67. But acts imposing personal liability will be strictly construed. Union Tr. & Sav. Bank v. Blair-Harper Seed Co., 202 N. W. (Iowa, 1925) 839; Union Nat. Bank v. Blair-Harper Seed Co., 202 N. W. (Iowa, 1925) 843. On the question of the power of the legislature to increase the liability of stockholders, see also sec. 147, n. 2, 3.

[28] Davis v. Moore, 130 Ark. (1917) 128, 197 S. W. 295; State Sav. & Commercial Bank v. Anderson, 238 U. S. (1915) 611, 59 L. ed. 1504; Jeffries v. Brown, 90 Kans. (1913) 495, 135 Pac. 582; Montgomery Bank & T. Co. v. Walker, 181 Ala. (1913) 368, 61 So. 951; State v. Title Guar. & Sur. Co., 27 Idaho (1915) 752, 152 Pac. 189; Van Tuyl v. Sullivan, 217 N. Y. (1916) 691, 112 N. E. 1078; Collins v. American Exchange Nat. Bank of N. Y., 147 Ga. (1917) 273, 93 S. E. 880; Bryan v. Bullock, 84 Fla. (1922) 179, 93 So. 182; State v. Norman, 86 Okla. (1922) 36, 206 Pac. 522; In re Bean, 201 N. Y. S. (1924) 827.

[29] Anderson v. Commonwealth, 18 Grat. (Va., 1868) 295; Bissell v. Heath, 98 Mich. (1894) 472, 57 N. W. 585; Deloria v. Atkins, 158 Mich. (1909) 232, 122 N. W. 559; Gardner v. Hope Ins. Co., 9 R. I. (1869) 194, 11 Am. Rep. 238; In re Oliver Lee & Co.'s Bank, 21 N. Y. (1860) 9; South Bay Meadow Dam Co. v. Gray, 30 Maine (1859) 547; Stanley v. Stanley, 26 Maine (1846) 191. The majority can vote to cease business if they do not wish to continue under the new liability, but a single individual can not force the corporation to cease because he does not wish to take the new responsibility. Williams v. Nall, 108 Ky. (1900) 21, 21 Ky. L. 1526, 55 S. W. 706.

[30] Justice Straup argued that this law merely altered the contract between the individual stockholder. Garey v. St. Joe Mining Co., 32 Utah (1907) 497, 91 Pac. 369. See also Enterprise Ditch Company v. Moffit, 58 Nebr. 642, 79 N. W. 560, 45 L. R. A. 647, 76 Am. St. 122, where a law changing the assessability of stock was likewise rejected. Such a law has been upheld in Montana. Somerville v. St. Louis M. & M. Co., 46 Mont. (1912) 268, 127 Pac. 464, L. R. A. 1915B, 811.

Statutes which are designed to prevent fraud have been universally upheld. As early as 1868, the federal court laid the basis for this rule in deciding that the state could compel foreign insurance corporations to deposit securities before doing business within the states.[31] Upon the same principle, laws providing that residents of the state shall have priority in case of insolvency have been held not to violate due process of law although they do abridge the privileges and immunities of citizens of the United States.[32] It is somewhat surprising, therefore, that the federal Circuit Courts should have found any difficulty in upholding the Ohio blue sky law, which provided for the filing of financial statements before any stock could be floated.[33] The Federal Supreme Court, however, did

[31] Paul v. Virginia, 8 Wall. (U. S., 1868) 168, 19 L. ed. 357. See also: Hooper v. California, 155 U. S. (1895) 648, 39 L. ed. 297; People v. Granite State P. Assn., 161 N. Y. (1900) 492, 55 N. E. 1053; State v. Tontine Sur. Co., 62 Ohio St. (1900) 428, 57 N. E. 60; Morrill v. Colonial Secur. Co., 101 Tex. (1908) 309, 107 S. W. 524.

[32] Blake v. McClung, 172 U. S. (1898) 239 at 260, 261, 43 L. ed. 432; Sully v. American Nat. Bank, 178 U. S. (1900) 289. See also: McGoon v. Scales, 9 Wall. (U. S., 1869) 23, 19 L. ed. 545; In re Standard Oak Veneer Co., 173 Fed. (1909) 103; People v. Granite State Provident Assn., 161 N. Y. (1900) 492, 55 N. E. 1053; Frowert v. Blank, 205 Pa. (1903) 299, 54 Atl. 1000; Voightman & Co. v. Southern R. Co., 123 Tenn. (1910) 452, 131 S. W. 982; Guimarin v. Southern Life & T. Co., 100 S. Car. (1915) 12, 84 S. E. 298; Morgan Bros. v. Dayton Coal &c. Co., 134 Tenn. (1916) 228, 183 S. W. 1019.

[33] These laws were upheld in the state courts: Mechanics B. & L. Assn. v. Coffman, 110 Ark. (1913) 269, 162 S. W. 1090; Ex parte Taylor, 68 Fla. (1914) 61, 66 So. 292; State v. Agey, 171 N. Car. (1916) 831, 88 S. E. 726. They were also sustained in one of the first federal cases: Standard Home Co. v. Davis, 217 Fed. (1914) 904. Even when declaring them void, as an unreasonable regulation of the right of private citizens to engage in business, the court was careful to state: "A state legislature may therefore prevent foreign corporations from transacting business altogether within its territorial limits, and it may limit all corporations, foreign and domestic, as to what particular kind of business they may or may not do within the state. So far as they are concerned, it is not a question of police power nor of interstate commerce, but purely and simply the exercise of a well recognized sovereign power over these artificial bodies. But no such power is vested in any legislature over either the individual citizen or over the copartnerships or voluntary associations formed or organized by him to do business. He has the equal right with any other citizen to do business in any state, and the states can not restrict or hamper his right to engage in interstate commerce or his inalienable right to contract, to buy and sell legitimate property." Dayton, D. J., in Bracey v. Darst, 218 Fed. (1914) 482 at 494, 495.

not attempt to sustain the law as an exercise of the reserve power, but placed its decision squarely upon the ground that the legislature had ample power to prevent frauds by police regulations.[34] This is an excellent illustration of the uncertainty surrounding the reserve power. Whenever possible the courts will use some other basis for their decisions.

Another class of cases, involving the right of the state to prevent fraud on the part of corporations, grew out of the difficulty of serving process on them. When they held their charters in another state this problem became acute. In 1855 a statute providing that process may be served on any agent of an insurance corporation was declared not to conflict with natural justice,[35] a ruling which was followed with regard to other corporations in 1882.[36] This

The majority of the lower federal courts, however, frowned on these acts. Alabama & N. O. Trans. Co. v. Doyle, 210 Fed. (1914) 173; Compton Co. v. Allen, 216 Fed. (1914) 537; Sioux Falls Co. v. Caldwell, 230 Fed. (1915) 236; Halsey Co. v. Merrick, 228 Fed. (1916) 805; Geiger-Jones Co. v. Turner, 230 Fed. (1916) 233. Justice Slater in the last of these decisions declared that this was not a regulatory measure but in reality prohibited a lawful occupation, stock-broking. He admitted the right of the state to regulate this business, but contended that the law before him would prohibit it under the guise of regulation.

[34] Hall v. Geiger Jones Co., 242 U. S. (1917) 539, 61 L. ed. 480; Caldwell v. Sioux Falls Stockyards Co., 242 U. S. (1917) 559, 61 L. ed. 493; Merrick v. Halsey, 242 U. S. (1917) 568, 61 L. ed. 498.

[35] Lafayette Ins. Co. v. French, 18 How. (U. S., 1855) 404, 15 L. ed. 340.

[36] St. Clair v. Cox, 106 U. S. (1882) 350, 27 L. ed. 222. Service of process on a corporate agent has been frequently upheld. The statute may even go so far as to designate the secretary of state as the corporate agent for this purpose. Societe Fonciere et Agricole Des Etats Unis v. Milliken, 135 U. S. (1890) 304, 34 L. ed. 208; In re Hohorst, 150 U. S. (1893) 653, 37 L. ed. 1211; Peterson v. Chicago, R. I. &c. R. Co., 205 U. S. (1907) 364, 51 L. ed. 841; Pennsylvania Fire Ins. Co. v. Gold Issue, M. & M. Co., 243 U. S. (1917) 93, 61 L. ed. 610; Flexner v. Farson, 249 U. S. (1919) 289, 63 L. ed. 250; Moch v. Virginia Fire & M. Ins. Co., 10 Fed. (1882) 696; Johnson v. Hanover Fire Ins. Co., 15 Fed. (1883) 97; Estes v. Belford, 22 Fed. (1884) 275; Brooks v. Dun, 51 Fed. (1892) 138; Devere v. Delaware, L. &c. R. Co., 60 Fed. (1894) 886; Smith v. Empire State-Idaho M. & D. Co., 127 Fed. (1904) 462; Knapp v. Bullock Tractor Co., 242 Fed. (1918) 543; City Fire I. Co. v. Carrugi, 41 Ga. (1871) 660; Ganebin v. Phelan, 5 Colo. (1879) 83; Swallow v. Duncan, 18 Mo. App. (1885) 622; Connecticut Mut. L. I. Co. v. Spratley, 99 Tenn. (1897) 322, 42 S. W. 145; Puster v. Parker Mercantile Co., 70 N. J. Eq. (1904) 771, 67 Atl. 1102; Groel v. United Elec. Co., 69 N. J. Eq. (1905) 397, 60 Atl. 822; Olender

doctrine has been reaffirmed in upholding the Wisconsin act making void all contracts of corporations which had not filed their charter with the proper administrative official.[37] It seems certain, however, that the same act

v. Crystaline Min. Co., 149 Cal. (1906) 482, 86 Pac. 1082; Wold v. Colt Co., 102 Minn. (1907) 386, 518, 114 N. W. 243, 244; Grant v. Cananea Consol. Copper Co., 189 N. Y. (1907) 241, 82 N. E. 191; Georgia R. & Banking Co. v. Bennefield, 138 Ga. (1910) 670, 72 S. E. 981; Minneapolis Threshing Mach. Co. v. Ashauer, 142 Wis. (1910) 646, 126 N. W. 113; Brown-Ketcham I. W. v. Swift Co., 53 Ind. App. (1913) 630, 100 N. E. 584; Appeal of Baylor, 93 S. Car. (1913) 414, 77 S. E. 59; Straub v. Lyman Land & I. Co., 31 S. Dak. (1913) 571, 141 N. W. 979; Title Guar. & S. Co. v. Slinker, 42 Okla. (1914) 811, 143 Pac. 41; Armstrong Co. v. New York Cent. &c. R. Co., 129 Minn. (1915) 104, 151 N. W. 917; Magnola Metal Co. v. Savannah Supply Co., 157 N. Y. S. (1915) 355; Gold Issue M. & M. Co. v. Pennsylvania F. I. Co., 267 Mo. (1916) 524, 184 S. W. 999; Pomeroy v. Hocking Valley R. Co., 218 N. Y. (1916) 530, 113 N. E. 504; Great Eastern Casualty Co. v. Haynie, 147 Ga. (1917) 119, 92 S. E. 939; Joel v. Bennett, 276 Ill. (1917) 537, 115 N. E. 5; Vicksburg, S. &c. R. Co. v. Forcheimer, 113 Miss. (1917) 531, 74 So. 418; Snelling v. National Travelers' Ben. Assn., 102 Kans. (1918) 227, 169 Pac. 1144; Reynolds v. Missouri, K. &c. R. Co., 228 Mass. (1918) 584, 117 N. E. 913; State ex rel. v. Gantt, 274 Mo. (1918) 490, 203 S. W. 964; Wildes v. Lou Dillon Goldfield Min. Co., 41 Nev. (1918) 364, 170 Pac. 1046; Kluver v. Middle-west Grain Co., 44 N. Dak. (1919) 210, 173 N. W. 468; Pekin Cooperage Co. v. Duty, 140 Ark. (1920) 135, 215 S. W. 715; Kaw Boiler Works v. Frymyer, 100 Okla. (1924) 81, 227 Pac. 453; Knutson v. Campbell River Mills, 300 Fed. (1924) 241; Meade Fibre Co. v. Varn, 3 Fed. (2d) (1925) 520; Kraus v. American Tobacco Co., 283 Pa. (1925) 146, 129 Atl. 60. *Contra:* King Tonopah Min. Co. v. Lynch, 232 Fed. (1916) 485; Knox Bros. v. Wagner, 141 Tenn. (1919) 348, 209 S. W. 638.

If no agent is designated process may be served on a specified state officer, e. g., insurance commissioner or state auditor. Old Wayne Mut. L. Assn. v. McDonough, 204 U. S. (1906) 8, 51 L. ed. 345; Cella Commn. Co. v. Bohlinger, 147 Fed. (1906) 419; Wilson v. Supreme Forest Woodmen Circle, 156 Ga. (1923) 403, 119 S. E. 394.

Where the action is in personam, however, service on an agent is a violation of due process. Moredock v. Kirby, 118 Fed. (1902) 180; Caldwell v. Armour, 1 Penn. (Del., 1899) 545; Cavanne v. Graf, 87 Minn. (1902) 510, 92 N. W. 461, 59 L. R. A. 735, 94 Am. St. 722; Flexner v. Farson, 268 Ill. (1915) 435, 109 N. E. 327. *Contra:* McNichol v. United States Mercantile Reporting Agency, 74 Mo. (1881) 457; Diamond Glue Co. v. United States Glue Co., 103 Fed. (1900) 838; Pittsburgh Const. Co. v. West Side Belt R. Co., 151 Fed. (1907) 125; Buffalo Refr. Mach. Co. v. Penn Heat & Power Co., 178 Fed. (1910) 696; Thomas v. Birmingham R. L. & P. Co., 195 Fed. (1912) 340; In re Springfield Realty Co., 257 Fed. (1919) 785; Franklin Ins. Co. v. Louisville &c. Packet Co., 72 Ky. (1873) 590.

[37] Munday v. Wisconsin Tr. Co., 252 U. S. (1920) 499, 64 L. ed. 684. See also Interstate Amusement Co. v. Albert, 239 U. S. (1915) 560, 60 L. ed. 439; Ehrhardt v. Robertson Bros., 78 Mo. App. (1899) 404; Ashland Lumber Co. v. Detroit Salt Co., 114 Wis. (1902) 66, 89 N. W. 904; Tri-State Amusement Co. v. Forest Park Highlands Amusement Co., 192 Mo.

could have been upheld as easily under the police power to prevent fraud.[38]

§ 152. Corporations occupy a peculiar position as employers of labor. They frequently have very large payrolls, and, almost invariably, the personal contact between

(1905) 404, 90 S. W. 1020; Allen v. Milwaukee, 128 Wis. (1906) 678, 106 N. W. 1099; First Nat. Bank v. Leeper, 121 Mo. App. (1906) 688, 97 S. W. 636; Hardison v. Plummer, 152 Ala. (1907) 619, 44 So. 591; United Shoe Mach. Co. v. Ramlose, 210 Mo. (1908) 631, 109 S. W. 567; Alabama Western R. Co. v. Talley-Bates Const. Co., 162 Ala. (1909) 396, 50 So. 341; Parke, Davis & Co. v. Mullett, 245 Mo. (1912) 168, 149 S. W. 461; Oliver Co. v. Louisville Realty Co., 156 Ky. (1913) 628, 161 S. W. 570; Booth v. Scott, 276 Mo. (1918) 1, 205 S. W. 633; German-American Bank v. Smith, 202 Mo. App. (1919) 133, 208 S. W. 878; Boddy v. Continental Inv. Co., 18 Ala. App. (1920) 65, 88 So. 294; Republic Acceptance Corp. v. Bennett, 220 Mich. (1922) 249, 189 N. W. 901; Barron G. Collier Inc. v. American Cafeteria, 215 Mo. App. (1923) 182, 256 S. W. 118; Republic Power & S. Co. v. Gus Blass Co., 165 Ark. (1924) 163, 263 S. W. 785; Jones v. General Motors Acceptance Corp., 205 Ky. (1924) 227, 265 S. W. 620.

It is noteworthy, however, that the courts construe such acts strictly and so will frequently hold the corporation to its agreement even though it could claim no rights under the contract. David Lupton's Sons Co. v. Automobile Club of America, 225 U. S. (1912) 489, 56 L. ed. 1177; Chattanooga, R. &c. R. Co. v. Evans, 66 Fed. (1895) 809; Lauter v. Jarvis-Conklin Mtg. T. Co., 85 Fed. (1897) 894; Kirven v. Virginia-Carolina Chem. Co., 145 Fed. (1906) 288; Dunlop v. Mercer, 156 Fed. (1907) 545; Cullman County v. Vincennes Bridge Co., 251 Fed. (1918) 473; Walter A. Wood Mowing & Reaping Mach. Co. v. Caldwell, 54 Ind. (1876) 270, 23 Am. Rep. 641; State v. American Book Co., 69 Kans. (1904) 1, 76 Pac. 411; Hastings Industrial Co. v. Moran, 143 Mich. (1906) 679, 107 N. W. 706; Thompson v. Nat. Mut. B. & L. Assn., 57 W. Va. (1905) 551, 50 S. E. 756; Kuenman v. United States Fid. & Guar. Co., 159 Mich. (1909) 122, 123 N. W. 799; Cooper v. Ft. Smith &c. R. Co., 23 Okla. (1909) 139, 99 Pac. 785; Verdigris River Land Co. v. Stanfield, 25 Okla. (1909) 265, 105 Pac. 337; Hunter W. Finch & Co. v. Zenith Furnace Co., 146 Ill. App. (1910) 257; Courier Journal Job Print. Co. v. Anderson, 159 Ill. App. (1910) 32; Model Heat. Co. v. Magarity, 2 Boyce (Del., 1911) 459, 81 Atl. 394; Hirschfeld v. McCullagh, 64 Ore. (1913) 502, 127 Pac. 541, 130 Pac. 1131; Lanz-Owen & Co. v. Garage Equipment Mfg. Co., 151 Wis. (1913) 555, 139 N. W. 393; Citizens' Tr. & Guar. Co. v. Hays, 167 Ky. (1915) 560, 180 S. W. 811; Ross v. New South Farm & Home Co., 191 Ill. App. (1915) 353; Watkins v. Donnell, 192 Mo. App. (1915) 640, 179 S. W. 980; Commercial Nat. Bank v. Jordan, 71 Fla. (1916) 566, 71 So. 760; Ryerson v. Shaw, 277 Ill. (1917) 524, 115 N. E. 650; Bettilyon Home Bldrs. Co. v. Philbrick, 31 Idaho (1918) 724, 175 Pac. 958; Temple v. Riverland Co., 228 S. W. (Tex. Civ. App., 1921) 605; Weber v. Pend D'Oreille Min. & Red. Co., Ltd., 35 Idaho (1922) 1, 203 Pac. 891; Commonwealth Farm Loan Co. v. Caudle, 203 Ky. (1924) 761, 263 S. W. 24; The Automotive Material Co. v. The American Stan. Metal Prod. Corp., 232 Ill. App. (1924) 532.

[38] See especially: Fruin-Colnon Contr. Co. v. Chatterson, 146 Ky. (1912) 504, 143 S. W. 6.

worker and employer is lost. As a consequence, labor abuses are much more apt to be present when the employer is a corporation than when he is an individual. The regulation of these abuses has been very generally upheld under the power to amend the corporate charter. Laws requiring payment of wages in cash at stated intervals have been declared constitutional when applied to corporations with repealable charters.[39] This has been upheld both for railroads and for other corporations,[40] it being sustained not only because it was peculiarly con-

[39] Shaffer v. Union Min. Co., 55 Md. (1880) 74. These are valid if they require payment every month. Skinner v. Garnett Gold Min. Co., 96 Fed. (1898) 735; Terre Haute &c. R. Co. v. Baker, 4 Ind. App. (1892) 66, 30 N. E. 431; Small v. Hammes, 156 Ind. (1901) 556, 60 N. E. 342.

Semi-monthly wage payment may be required: Erie R. Co. v. Williams, 233 U. S. (1914) 685, 58 L. ed. 1155; Hancock v. Yaden, 121 Ind. (1890) 366, 23 N. E. 253; Commonwealth v. Marsh, 14 Pa. Co. Ct. (1891) 369, 3 Pa. Dist. 489; Commonwealth v. Reinecke Coal M. Co., 117 Ky. (1904) 885, 79 S. W. 287; Seeleyville Coal & M. Co. v. McGlosson, 166 Ind. (1906) 561, 77 N. E. 1044; Arkansas Stave Co. v. State, 94 Ark. (1910) 27, 125 S. W. 1001; New York Cent. &c. R. Co. v. Williams, 199 N. Y. (1910) 108, 92 N. E. 404; Macbeth-Evans Glass Co. v. Van Blarican, 176 Ind. (1911) 69, 95 N. E. 313; State v. Missouri Pac. R. Co., 242 Mo. (1912) 339, 147 S. W. 118; Smith v. Townley Mfg. Co., 218 S. W. (Mo., 1920) 870. *Contra:* Sally v. Berwind-White Coal M. Co., 5 Pa. Dist. (1891) 316; State v. Potomac Val. Coal Co., 116 Md. (1911) 380, 81 Atl. 686; State v. Cullom, 138 La. (1915) 395, 70 So. 338; State v. McCarroll, 138 La. (1915) 454, 70 So. 448.

Weekly payments can be required. Lawrence v. Rutland R. Co., 80 Vt. (1907) 370, 67 Atl. 1091; New York Cent. &c. R. Co. v. Williams, 199 N. Y. (1910) 108, 92 N. E. 404. But these are also valid when extended to natural persons. In re Opinion of the Justices, 163 Mass. (1895) 589, 40 N. E. 713, 28 L. R. A. 344; Hancock v. Yaden, 121 Ind. (1889) 366, 23 N. E. 253, 6 L. R. A. 576, 16 Am. St. 396. *Contra:* Republic Iron & S. Co. v. State, 160 Ind. (1903) 379, 66 N. E. 1005. But these are also valid under the police power. In re Opinion of the Justices, 163 Mass. (1895) 589, 40 N. E. 713; Hancock v. Yaden, 121 Ind. (1889) 366, 23 N. E. 253; Manford v. Menil Singh, 40 Cal. App. (1919) 700, 181 Pac. 844.

There are a considerable number of cases in which acts regulating the time at which wages must be paid have been held void for special reasons. In re Crane, 26 Cal. App. (1914) 22, 145 Pac. 733; State v. Prudential Coal Co., 130 Tenn. (1914) 275, 170 S. W. 56; Sorenson v. Webb, 111 Miss. (1916) 87, 71 So. 273; Anderson v. Uncle Sam Oil Co., 106 Kans. (1919) 483, 186 Pac. 198; Davidow v. Wadsworth Mfg. Co., 211 Mich. (1920) 90, 178 N. W. 776; Superior Laundry Co. v. Rose, 193 Ind. (1922) 138, 137 N. E. 761.

[40] A different rule may be applied to railroads than to other corporations under the repeal power. New York Cent. &c. R. Co. v. Williams, 199 N. Y. (1910) 108, 92 N. E. 404.

sistent with the nature of the corporations,[41] but also because of the public benefit to be derived from the law.[42] Although most courts have supported this regulation under the police power, the Vermont court took special pains to point out that, if it could not be supported on that ground,[43] it could be sustained on the right to amend the act of incorporation.[44] The court in this case was confronted with a conflict of cases regarding the constitutionality of such laws under the police power, and, therefore, preferred to rest its opinion on the broader ground that corporations established subject to the repeal power had already agreed to the amending power of the state, when it was exercised consistently with the fundamental nature of the corporation.

The danger that corporations might abuse their tremendous power was also the basis of the decisions in another type of wage-payment cases. An Arkansas law provided that railroad and bridge corporations should pay their employees immediately upon discharge, and that the wages should continue until the employee was paid. The Supreme Court of Arkansas upheld this law because of the peculiar necessities of guarding abuses by corpora-

[41] "This legislation may be justified upon the ground that the purposes of the state in creating corporations will be the better accomplished by some amendment." Justice Morrow, Skinner v. Garnett Gold Min. Co., 96 Fed. (1899) 735 at 744, 745.

[42] Arkansas Stave Co. v. State, 94 Ark. (1910) 27, 125 S. W. 1001, 27 L. R. A. (N. S.) 255, 140 Am. St. 103; New York Cent. &c. R. Co. v. Williams, 199 N. Y. (1910) 108, 92 N. E. 404; Lawrence v. Rutland R. Co., 80 Vt. (1907) 370, 67 Atl. 1091, 15 L. R. A. (N. S.) 350, 13 Ann. Cas. 475.

[43] Such a law had been declared void under the police power in Johnson v. Goodyear Min. Co., 127 Cal. (1899) 4, 59 Pac. 304; a law requiring that store orders be redeemed in cash within thirty days was upheld under the police power. "The police power of the State may, within defined limitations, extend over corporations outside of and regardless of the power to amend charters." Knoxville Iron Co. v. Harbison, 183 U. S. (1901) 13, 46 L. ed. 55.

[44] This act does not destroy the right of contract, but merely imposes reasonable regulations on it. The right to impose regulations is inherent in the police power. "The reserved power with which we are dealing, like the police power, is, we have said, limited by the requirements of the public good." Lawrence v. Rutland R. Co., 80 Vt. (1907) 370 at 383, 67 Atl. 1091, 15 L. R. A. (N. S.) 350, 13 Ann. Cas. 475.

tions, and because this act was in accordance with the original charter.[45] A case involving the same law was unsuccessfully appealed to the United States Supreme Court which adopted the reasoning of the state body.[46] With this stamp of approval on its position, the Arkansas court applied the same doctrine in upholding the coal screening act which provided that coal operators should weigh the coal for payment as it was dug before it was screened.[47] Store order legislation was subsequently upheld on the same ground,[48] and it was one of the reasons

[45] There is a *dictum* in this case to the effect that an amendment to the charter prescribing a minimum wage would change the purpose of the incorporation and hence would be void. Leep v. St. Louis, I. M. &c. R. Co., 58 Ark. (1894) 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. 109.

[46] Chief Justice Fuller declared: "Corporations are the creations of the state, endowed with such faculties as the state bestows and subject to such conditions as the state imposes, and if the power to modify their charters is reserved, that reservation is a part of the contract, and no change within the legitimate exercise of the power can be said to impair its obligation; and as this amendment rested on reasons deduced from the peculiar character of the business of the corporations affected and the public nature of the functions, and applied to all alike, the equal protection of the law was not denied." St. Louis, I. M. &c. R. Co. v. Paul, 173 U. S. (1899) 404 at 408, 43 L. ed. 746.

In other cases acts involving regulation of wage payments on discharge were upheld: Wynne v. Seaboard Air Line R., 96 S. Car. (1913) 1, 79 S. E. 521; Arizona Power Co. v. State, 19 Ariz. (1917) 114, 166 Pac. 275; Moore v. Indian Spring Channel Gold Min. Co., 37 Cal. App. (1918) 370, 174 Pac. 378. The Indiana courts have refused to follow the general trend of opinion in this respect: Cleveland, C., C. &c. R. Co. v. Schuler, 182 Ind. (1914) 57, 105 N. E. 567; Baltimore &c. R. Co. v. Burdalow, 57 Ind. App. (1914) 267, 106 N. E. 902; State v. Martin, 193 Ind. (1922) 120, 139 N. E. 282.

[47] One justice dissented on the ground that corporations were no different in this respect from other employers. Woodson v. State, 69 Ark. (1900) 521, 65 S. W. 465.

This law was sustained: McLean v. Arkansas, 211 U. S. (1911) 539, 53 L. ed. 315. See also: Rail & River Coal Co. v. Yaple, 236 U. S. (1914) 338, 59 L. ed. 607; Jones v. People, 110 Ill. (1884) 590; Reinecke v. People, 15 Ill. App. (1884) 241; Smith v. State, 90 Tenn. (1891) 575, 18 S. W. 248; State v. Peel Splint Coal Co., 36 W. Va. (1892) 802, 15 S. E. 1000, 17 L. R. A. 385; Martin v. State, 143 Ind. (1896) 545, 42 N. E. 911; State v. Wilson, 61 Kans. (1899) 32, 58 Pac. 981.

[48] Union Sawmill Co. v. Felsenthal, 85 Ark. (1908) 346, 108 S. W. 217. See also: Knoxville Iron Co. v. Harbison, 183 U. S. (1901) 13, 46 L. ed. 55; Dayton Coal & Iron Co. v. Barton, 183 U. S. (1901) 23, 46 L. ed. 61; Keokee Consol. Coke Co. v. Taylor, 234 U. S. (1914) 224, 58 L. ed. 1288; Tremont Lumber Co. v. Reagan, 245 U. S. (1917) 625, 62 L. ed. 517; State v. Loomis, 20 S. W. (Mo., 1892) 332, 333; Agee v. Smith, 7 Wash. (1893) 471, 35 Pac. 370; Avent Beattyville Coal Co. v. Commonwealth, 96

supporting the service letter law.[49] Just how far this line of reasoning may lead, remains for future cases to determine.[50] It has been applied by some courts to workmen's compensation cases,[51] and the only limits, which the courts, thus far, have put upon it under due process, are to be found in the necessity of satisfying some public policy, and in the requirement that the statutes enacted must accord with the inherent nature of the corporation.

§ 153. The very size of corporations raises quite naturally the problem of monopolies. Under the police power, the legislature may prohibit combinations in restraint of trade, for by so doing they are only codifying a common law rule.[52] It would seem, therefore, that there would be little difficulty in upholding such legislation, when exercised under the power to repeal corporate charters. Combinations of corporations may be prevented and the charters of offending corporations repealed,[53] or

Ky. (1894) 218, 28 S. W. 502; Cumberland Glass Mfg. Co. v. State, 58 N. J. L. (1895) 224, 33 Atl. 210; In re House Bill No. 147, 23 Colo. (1897) 504, 48 Pac. 512; State v. Balch, 178 Mo. (1903) 392, 77 S. W. 547; State v. Missouri Tie & Timber Co., 181 Mo. (1904) 536, 80 S. W. 933; Atkins v. Grey Eagle Coal Co., 76 W. Va. (1915) 27, 84 S. E. 906; In re Ballestra's Petition, 173 Cal. (1917) 657, 161 Pac. 120; Pond Creek Coal Co. v. Lester, 171 Ky. (1917) 811, 188 S. W. 907; Prairie Pebble Phosphate Co. v. Silverman, 80 Fla. (1920) 541, 86 So. 508. *Contra:* Showalter v. Ehlan, 5 Pa. Super. Ct. (1897) 242.

[49] The act required corporations to give employees, leaving their employment, a "service letter" stating the character of work performed and the circumstances under which the worker left. Justice Pitney pointed out that the state has a very wide power over corporations, and hence a reasonable law like that under consideration was valid. Prudential Ins. Co. v. Cheek, 259 U. S. (1922) 530, 66 L. ed. 1044.

[50] See Wynne v. Seaboard Air Line R., 96 S. Car. (1913) 1, 79 S. E. 521.

[51] Lewis v. Northern Pac. R. Co., 36 Mont. (1907) 207, 92 Pac. 469; Ozan Lumber Co. v. Biddie, 87 Ark. (1908) 587, 113 S. W. 796. *Contra:* Ives v. South Buffalo R. Co., 201 N. Y. (1911) 271, 94 N. E. 431.

For other cases involving the validity of the workmen's compensation acts, see pp. 248-250, n. 21.

[52] Freund, Police Power, sec. 355.

[53] Erie &c. R. Co. v. Casey, 26 Pa. (1856) 287. See also: Waters-Pierce Oil Co. v. Texas, 177 U. S. (1900) 28, 44 L. ed. 657; Standard Oil Co. v. Missouri, 224 U. S. (1912) 270, 56 L. ed. 760; Standard Oil Co. v. United States, 221 U. S. (1911) 1, 55 L. ed. 619; United States v. American Tobacco Co., 221 U. S. (1911) 106, 55 L. ed. 663; International Harvester Co. v. Missouri, 234 U. S. (1914) 199, 58 L. ed. 1276; United

the contracts of combines may be made unenforceable in the courts.[54] Furthermore, the legislature may impose a penalty for entering into a trust,[55] and classifications of corporations under such laws receive greater indulgence than do other classifications.[56]

It thus appears that in cases where the regulations have an inherent relation to the special nature of the artificial

States v. Great Lakes Towing Co., 245 U. S. (1918) 675, 62 L. ed. 542; United States v. United States Steel Corp., 251 U. S. (1920) 417, 64 L. ed. 343; Continental Ins. Co. v. United States, 259 U. S. (1922) 156, 66 L. ed. 871; Liverpool & L. & G. I. Co. v. Clunie, 88 Fed. (1898) 160; United States v. E. I. Du Pont De Nemours & Co., 188 Fed. (1911) 127; United States v. Reading Co., 273 Fed. 848; United States v. E. I. Du Pont De Nemours & Co., 273 Fed. (1921) 869; United States v. Lake Shore & Mich. S. R. Co., 281 Fed. (1922) 1007; United States v. New England Fish Exch., 292 Fed. (1923) 511; State ex rel. v. Portland Natural Gas &c. Co., 153 Ind. (1899) 483, 53 N. E. 1089; State v. Firemen's Fund Ins. Co., 152 Mo. (1899) 1, 52 S. W. 595; San Antonio Gas Co. v. State, 22 Tex. Civ. App. (1899) 118, 54 S. W. 289; State v. Standard Oil Co., 61 Nebr. (1900) 28, 84 N. W. 413; Crystal Ice & Mfg. Co. v. State, 23 Tex. Civ. App. (1900) 293, 56 S. W. 562; In re Davies, 168 N. Y. (1901) 89, 61 N. E. 118; State v. Armour Pack. Co., 173 Mo. (1903) 356, 73 S. W. 645; State v. Continental Tobacco Co., 177 Mo. (1903) 1, 75 S. W. 737; Attorney General ex rel. v. A. Booth & Co., 143 Mich. (1906) 89, 106 N. W. 868; State v. Duluth Board of Trade, 107 Minn. (1909) 506, 121 N. W. 395; State v. Jackson Cotton Oil Co., 95 Miss. (1909) 6, 48 So. 300; State v. International Harvester Co., 81 Kans. (1910) 610, 106 Pac. 1053; State v. National Cash Register Co., 31 Ohio Cir. Ct. (1910) 637; State v. Minneapolis Milk Co., 124 Minn. (1913) 34, 144 N. W. 417; State ex rel. v. Mallinckrodt Chemical Works, 249 Mo. (1913) 702, 156 S. W. 967; Attorney General ex rel. v. National Cash Register Co., 182 Mich. (1914) 99, 148 N. W. 420; State ex rel. v. Polar Wave Ice & Fuel Co., 259 Mo. (1914) 578, 169 S. W. 126; State v. Arkansas Lumber Co., 260 Mo. (1914) 212, 221, 169 S. W. 145; State v. Armour Pack. Co., 265 Mo. (1915) 121, 176 S. W. 382; Venner v. New York Cent. R. Co., 158 N. Y. S. (1917) 602; People v. Milk Producers' Assn., 60 Cal. App. (1923) 439, 212 Pac. 957; State v. Lorillard Co., 181 Wis. (1923) 347, 193 N. W. 613.

[54] Gibbs v. Consolidated Gas Co., 130 U. S. (1889) 396, 32 L. ed. 979. See also: Anheuser-Busch Brew. Assn. v. Houck, 27 S. W. (Tex. Civ. App., 1894) 692; Texas & P. Coal Co. v. Lawson, 89 Tex. (1896) 394, 32 S. W. 871, 34 S. W. 919; Hammond Pack. Co. v. Arkansas, 212 U. S. (1907) 322, 53 L. ed. 530.

[55] "The determination whether the power to repeal, alter, or amend was exerted in such a manner as to be unjust to incorporators was within the province of the state court to finally decide, unless the power was exerted in such an arbitrary manner as, irrespective of the contract clause to deprive of some other and fundamental right which was within the protection of the constitution of the United States." Justice White, Hammond Pack. Co. v. Arkansas, 212 U. S. (1909) 322 at 346, 53 L. ed. 530.

[56] Waters-Pierce Oil Co. v. Texas, 177 U. S. (1900) 28, 44 L. ed. 657.

person created by the state, a greater power arises out of the right to amend the charter than the legislature possessed under the police power. The two overlap in the vast majority of cases, and it is only in the twilight zones, where it may be fairly questioned whether the police power could be used, or whether the classification is valid, that the power to alter the grant becomes important. In connection with a quasi-police power it is often used to give added strength to the position of the court, but there seems to have been no case in which it has been used entirely independently of the more general power. This is especially striking, for in regulations demanded by the peculiar nature of the corporate entity, one would certainly expect the power to repeal the charter to have a wider meaning than the other powers of government.

§ 154. Justice Cooley declared in 1880: "There is no well-considered case in which it has been held that a legislature, under its power to amend a charter, might take away from the corporation any of its substantial property or property rights."[57] This statement, sweeping as it is, was undoubtedly a correct summary of the attitude of the courts prior to that time,[58] and has been practically universally recognized as the law in the more recent decisions.[59] Even the New York court, although pointing

[57] Detroit v. Detroit &c. R. Co., 43 Mich. (1880) 140 at 147, 5 N. W. 275.

[58] See note of Chief Jutice Dixon to Madison, W. & M. P. R. Co. v. Reynolds, 3 Wis. (Dixon's Notes, 1875) 287. See also Miller v. State, 15 Wall. (U. S., 1872) 487, 21 L. ed. 98; Turpin v. Locket, 6 Call (Va., 1804) 113; Cumberland &c. R. Co. v. Barren Co. Ct., 73 Ky. (10 Bush., 1874) 604. There seems to have been but one exception. Louisville v. University of Louisville, 54 Ky. (15 B. Mon., 1854) 642.

[59] "The courts . . . concur in denying that . . . the legislature can strip a corporation of its rights of property." Justice Bradbury, Ohio v. Neff, 52 Ohio St. (1895) 375, 40 N. E. 720. See also Garey v. St. Joe Min. Co., 32 Utah (1906) 497, 91 Pac. 369, 12 L. R. A. (N. S.) 554; District of Columbia v. Capital Tract. Co., 41 App. D. C. (1913) 115; Looker v. Maynard ex rel., 179 U. S. (1900) 46, 45 L. ed. 79; Bryan v. Board of Educ., 90 Ky. (1890) 322, 13 S. W. 276; People v. O'Brien, 111 N. Y. (1888) 1, 18 N. E. 692; State v. Brown &c. Mfg. Co., 18 R. I. (1892) 16, 25 Atl. 246, 17 L. R. A. 856; Columbia Tr. Co. v. Lincoln

out the vast extent of this power, proceeded to declare that it could not be used to divest property rights.[60] Such a doctrine is indeed, part and parcel of the general fabric of due process of law, for the power to divest property rights would be in reality a power of confiscating the property of the shareholders.[61]

This relation between due process of law and the power to alter charters was by no means understood at first. Even as late as 1878, Chief Justice Doe of the New Hampshire court, in working out an elaborate theory by which the rights of individuals who owned stock could be protected against abuses of the repeal power, placed his entire argument on the general doctrine of the separation of powers.[62] It is believed that the first judge to elaborate the close connection between the concept of vested rights as a limitation, the repeal power and the idea of due process of law was Justice Field, then on the federal circuit court.[63] The California Constitution had differen-

Institute, 138 Ky. (1910) 804, 129 S. W. 113, 29 L. R. A. (N. S.) 53; People ex rel. v. Boston &c. R. Co., 70 N. Y. (1877) 569.

[60] "The power thus reserved is not only vast in extent, but is in many respects alarming. As it rests in the legislative will to repeal the charter of a corporation and destroy its life, so it may prescribe such conditions as it chooses to the continued enjoyment of its franchises. It is readily seen that by means of this control the legislature may regulate any and all affairs of a corporation through the simple medium of conditioning its right to exist as a corporation." He then went on to point out that one of the limitations on this power is that it could not be used to divest property rights. Hinckley v. Schwarzschild & Sulzberger Co., 107 App. Div. (1905) 470 at 473, 474, 95 N. Y. S. 357.

[61] "If the legislative power of amendment were a power of confiscation it could be exercised as well by an alteration of some other law as by an alteration of a charter, and as well against unincorporated as against incorporated persons." Opinion of the Justices, 66 N. H. (1891) 629 at 641, 33 Atl. 1076. See also Barth v. Pock, 51 Mont. (1916) 418, 155 Pac. 282; Woodson v. State, 69 Ark. (1900) 521, 65 S. W. 465 (dissent by Chief Justice Bunn).

[62] "The legislative effort to protect public interests against a contractual abdication of legislative power, by a reservation making a charter amendable and repealable like other statutes that are not contracts, does not demolish the safeguards provided by the state constitution for private rights, does not unite powers which the constitution has separated, and does not revive absolutism which the constitution extirpated nearly a hundred years ago." In the entire opinion there is no mention of due process of law. Ashuelot R. Co. v. Elliot, 58 N. H. (1878) 451 at 457.

[63] As early as 1856 Justice Lewis (dissenting in Erie &c. R. Co. v.

tiated between the property of individuals and that of railroads for taxing purposes, allowing deductions for mortgages on the part of the former but not on the part of the latter. The law further had made no provision for a hearing before an assessment board, but the taxes were to be assessed after the railroad had submitted a statement of its valuation.

The procedural aspects of the case brought due process to the foreground. It was evident that the property of individuals could not be taken without notice and hearing, but the question whether the Fourteenth Amendment applied to corporations produced considerable difficulty. It was because the corporation was merely a device for the representation of the interests of individuals, that the court was able to look back of the artificial person to the shareholders who composed it. To deprive the corporation of property would, in reality, deprive the stockholders of the property. Consequently, if due process of law had any value, it must protect corporations as well as individuals,[64] and the state cannot withdraw from a corporation, by reserving the right to repeal its charter, the protections of the federal Constitution.[65] Justice Field was not alone in his views on this subject, for he had the concurrence of Justice Sawyer in his reasoning in this case,[66] as well as in another of like nature decided the year

Casey, 26 Pa. (1856) 287) had suggested that due process might limit the abuse of legislative control over corporations. This had also been suggested by Justice Cooley, Detroit v. Detroit &c. R. Co., 43 Mich. (1880) 140 at 142, 5 N. W. 275.

[64] Justice Field claimed that all courts have held this view by tacit consent. "This has been because the property of a corporation is in fact the property of the corporators." This is not true of the corporate life and liberty and hence these can be destroyed. San Mateo County v. Southern Pac. Co., 13 Fed. (1882) 722 at 747.

[65] "The state, in the creation of corporations . . . possesses no power to withdraw them when created, or by amendment, from the guarantees of the federal constitution." San Mateo County v. Southern Pac. Co., 13 Fed. (1882) 722 at 754.

[66] Justice Sawyer declared that the property of a corporation "is protected like all other property, and can only be taken by the law of the land, in some one of the modes not inhibited by the constitution. It can not, in my judgment be taken even as a further condition of corporate existence without the assent of the corporation or its corporators." San Mateo County v. Southern Pac. Co., 13 Fed. (1882) 722 at 777.

following.[67] These cases formed the basis for the subsequent development of due process as a reserve power limitation.

§ 155. Just what property is protected by due process presented the next difficulty. It is evident that property which the corporation had upon incorporation will be protected from legislative encroachments,[68] but the difficulty, arises in regard to property subsequently acquired by the corporation as a result of the franchise granted to it by the state. It might seem that this property, being still part of the corporate value and as yet unapportioned, could not be said to be owned by the individual shareholders; but to adopt this reasoning, would have meant that due process of law would be practically useless as a protection against legislative usurpation under the guise of amending charters. In most cases, furthermore, it would be well nigh impossible to separate the original from the acquired property. Simple administrative convenience, as well as from the necessity of giving due process a meaning in this connection, induced Justice Field to adopt the other view.[69] This reasoning has been adopted by other courts,[70] and by some (including the Supreme Court) it has even been applied to credits and other intangible property.[71]

[67] Santa Clara County v. Southern Pac. Co., 18 Fed. (1883) 385.

[68] Woodson v. State, 69 Ark. (1900) 521, 65 S. W. 405.

[69] "The property of the corporation, acquired in the exercise of its faculties, is held independently of such reserved power, and the state can only exercise over it the control which it exercises over the property of individuals engaged in similar business." San Mateo County v. Southern Pac. Co., 13 Fed. (1882) 722 at 755. Of course where only the franchise is affected the matter is different. Fox v. Cincinnati, 104 U. S. (1881) 783, 26 L. ed. 928.

[70] "The legislature may alter or repeal the charter and extinguish the corporate existence of the association, but it is without power to take away from the shareholders the property which they have acquired during its existence." Justice Van Syckel, In re Newark Library Assn., 64 N. J. L. (1899) 217 at 219, 43 Atl. 435. See also Metropolitan R. Co. v. MacFarland, 20 App. D. C. (1902) 421.

[71] Orient Ins. Co. v. Daggs, 172 U. S. (1899) 557, 43 L. ed. 552; Lansing v. Michigan Power Co., 183 Mich. (1914) 400, 150 N. W. 250; Owensboro v. Cumberland Tel. & Tel. Co., 230 U. S. (1913) 58, 57 L. ed. 1389; Northern Bank of Kentucky v. Stone, 88 Fed. (1898) 413. The principle that vested rights prevented the impairment of mortgages in

§ 156. A still more difficult question arose in regard to franchises. Could the franchise right which has been derived from the state be considered property? To so consider it would obviously mean in practice that the power to repeal a charter would be of no value; for there would be practically no cases where such a repeal would not involve a loss of franchise rights. With this in mind, Justice Field declared that although the state could not deprive a corporation of its invested or earned property, the franchise which it had given the company could be changed.[72] This undoubtedly represents the prevailing opinion at that period. As early as 1853 the Georgia Court held a franchise to be revocable,[73] and three years later, although by the close vote of three to two, the Pennsylvania court held that the franchise could be taken and a railroad administered by the state during reorganization.[74] The doctrine as thus established was followed by a considerable number of state courts before 1880.[75] Another federal circuit court had even held that under the power to repeal the franchise incidental property may be impaired,[76] and the United States Supreme Court had upheld a statute which obviously caused a very great

this connection had been laid down, Ashuelot R. Co. v. Elliot, 58 N. H. (1878) 451. See also: Omaha Water Co. v. Omaha, 147 Fed. (1906) 1. *Contra:* Louisville v. University of Louisville, 54 Ky. (15 B. Mon., 1854) 642, in which it was held the city could revoke its grant of land to the University.

[72] Santa Clara County v. Southern Pac. Co., 18 Fed. (1883) 385.

[73] Union Branch R. Co. v. East Tennessee &c. R. Co., 14 Ga. (1853) 327.

[74] Erie &c. R. Co. v. Casey, 26 Pa. (1856) 287.

[75] Kenosha, R. &c. R. Co. v. Marsh, 17 Wis. (1863) 13; Pratt v. Brown, 3 Wis. (1854) 603; Perin v. Oliver, 1 Minn. (1858) 202; Griffin v. Kentucky Ins. Co., 66 Ky. (3 Bush., 1868) 592, 96 Am. Dec. 259; Chapin v. Crusen, 31 Wis. (1872) 209; State v. Commissioner of R. Taxation, 37 N. J. L. (1874) 228; State v. Milwaukee Gas Light Co., 29 Wis. (1872) 454, 9 Am. Rep. 598; West End &c. R. Co. v. Atlanta St. R. Co., 49 Ga. (1873) 151.

[76] "The fact that such alteration might affect the value of its property or franchises can not touch the question of power in the legislature. The repeal of its franchises would have well-nigh destroyed the value of its tangible property; and while the latter, as such could not be taken, still its essential value for use on the railroad would be gone." Justice Drummond, In re Northwestern R. Co., 20 Int. Rev. Rec. (1874) 18; Fed. Cas. No. 10340.

property loss as the incidental result of the repeal of the franchise.[77]

§ 157. The modern tendency, however, seems to be in the other direction. If the deprivation of property, which the repeal of the franchise causes, is great, there is some reason for thinking that the courts will hold the property right inviolate.[78] Thus when an ordinance of a city deprives a road company of tolls over two and a half miles of its road, Justice Cooley declared that the franchise, being so closely linked with the property, could not be taken without violating the law of the land.[79] In New York the right to charge tolls for bicycles was said to be so closely related to the value of the property that the corporation could not constitutionally be deprived of it.[80] The Supreme Court of the United States has held that when locks are operated under a franchise they cannot be condemned without paying for the value of the right to operate them.[81] In this case the federal government,

[77] Greenwood v. Freight Co., 105 U. S. (1881) 13, 26 L. ed. 961. On the other hand see Boston &c. R. Co. v. Greenbush, 5 Lans. (1872) 461, 52 N. Y. 510; Cass v. Morrison, 28 Minn. (1881) 257, 9 N. W. 761.

[78] Note that the name of the corporation is not a property right, however, National Council v. State Council, 203 U. S. (1906) 151, 51 L. ed. 132; Polk v. Mutual R. F. L. A. Co., 207 U. S. (1907) 310, 52 L. ed. 222.

[79] Detroit v. Detroit &c. R. Co., 43 Mich. (1880) 140, 5 N. W. 275. There had been earlier implications of the same doctrine. Chapin v. Crusen, 31 Wis. (1872) 209; Zimmerman v. Perkiomen &c. Tpk. Co., 81 Pa. (1873) 96.

[80] Rochester &c. R. Co. v. Joel, 41 App. Div. (1899) 43, 58 N. Y. S. 346.

On the other hand there are a large number of cases in which the court upheld the right to fix rates under the repeal power. See sec. 148, n. 7.

[81] Monongahela Nav. Co. v. United States, 148 U. S. (1893) 312, 37 L. ed. 463. See also: Bowman v. Wathen, 42 U. S. (1843) 189, 11 L. ed. 97; Meade v. Portland, 200 U. S. (1906) 148, 50 L. ed. 413; Fidelity Tr. & S. Vault Co. v. Mobile St. R. Co., 53 Fed. (1892) 687; East Hartford v. Hartford Bridge Co., 17 Conn. (1845) 79; In re Flatbush Ave., 1 Barb. (N. Y., 1847) 286; State v. Noyes, 47 Maine (1859) 189; Columbia Del. Bridge Co. v. Geisse et al., 35 N. J. L. (1871) 558; Mason v. Harper's Ferry Bridge Co., 17 W. Va. (1880) 396; Manhattan R. Co. v. Mayor of New York City, 35 N. Y. S. (1893) 505; Kennebec Water Dist. v. Waterville, 97 Maine (1902) 185, 54 Atl. 6; Michigan Cent. R. Co. v. State, 148 Mich. (1907) 151, 111 N. W. 735; Belleville v. St. Clair County Tpk. Co., 234 Ill. (1908) 428, 84 N. E. 1049; In re Monongahela Water Co., 223 Pa. (1909) 323, 72 Atl. 625; Manheim Borough v. Manheim Water Co., 229

which brought the condemnation proceedings, did not have the right to repeal the franchise, for only the state had reserved that right. But the reasoning of the case would seem to have applied equally to a situation in which that power had been retained.[82]

This interpretation of the attitude of the courts has been very materially strengthened by the reasoning of the United States Supreme Court in a number of subsequent decisions.[83] Especially noteworthy is the Western Union case in which it was held that a discriminatory license fee could not be imposed upon a corporation; for if the company decided to cease business, it could not do so without great loss of property. The best view, therefore, seems to be that franchise rights of a corporation are repealable by the legislature under wide discretionary power. But when, as is frequently the case, those franchise rights cannot be repealed without impairment of valuable property owned by the corporation, and when this impairment appears to be arbitrary in its nature, an attempt to repeal the franchise must be considered a violation of due process of law, unless at the same time compensation is made for the property.

§ 158. It has been pointed out that the courts in applying the doctrine of "reasonableness" to police regulations, have not commonly relied upon a "balance of conven-

Pa. (1910) 177, 78 Atl. 93; La Crosse v. La Crosse Gas & Elec. Co., 145 Wis. (1911) 408, 130 N. W. 530; State ex rel. v. Bancroft, 148 Wis. (1912) 124, 134 N. W. 330; Lansing v. Michigan Power Co., 183 Mich. (1914) 400, 150 N. W. 250; People v. International Bridge Co., 223 N. Y. (1918) 137, 119 N. E. 351; Snidow v. Giles County, 123 Va. (1918) 578, 96 S. E. 810; Waterford Elec. Light, Heat & Power Co. v. State, 117 Misc. (1922) 480, 191 N. Y. S. 657. *Contra:* Erie &c. R. Co. v. Casey, 26 Pa. St. (1856) 287; Sixth Ave. R. Co. v. Gilbert El. R. Co., 3 Abb. N. C. (N. Y., 1878) 372.

[82] "The right to repeal franchises is controlled by the federal Constitution" and "no person can be deprived of vested rights in property except upon due process of law." People v. O'Brien, 45 Hun (1887) 519, 10 N. Y. S. 596. See also Citizens Horse R. Co. v. Belleville, 47 Ill. App. (1893) 388; Hughes v. Pine Lawn Cemetery, 177 N. Y. S. (1916) 175.

[83] Herndon v. Chicago, R. I. &c. R. Co., 218 U. S. (1909) 135, 54 L. ed. 970; Vicksburg v. Vicksburg Waterworks, 202 U. S. (1906) 453, 50 L. ed. 1102; Willcox v. Consolidated Gas Co., 212 U. S. (1908) 19, 53 L. ed. 382; Western Union T. Co. v. Kansas ex rel., 216 U. S. (1910) 1, 54 L. ed. 355.

ience."[84] Under this doctrine the courts will sanction legislative interference with private rights only when there is a fair balance between the advantage which the public will derive from the statute and the degree of interference with private rights which it involves. If the advantage to the public is small, only slight burdens can be imposed, but, where the public reaps an overwhelming advantage from the legislation, it may legitimately interfere with personal or property rights to a correspondingly extensive degree. It may then be asked, if in speaking of reasonableness as a limitation upon the power to amend corporate charters,[85] the courts have some other test in mind than the one which has been developed in their control of police regulations. It is submitted that the "balance of convenience" applies in both cases.

§ 159. In the first place, where the degree of interference is but slight, the courts, with unerring uniformity, uphold the law as beneficial to the public. Thus where there was merely created a state fund, which is held as a protection to the public against bankruptcy or accidents, the Supreme Court of the United States pointed out that all that was taken was the use of the money for a short time, a consideration which was negligible in view of the great public convenience.[86] The same reasoning seems

[84] See sec. 129.

[85] Garey v. St. Joe Min. Co., 32 Utah (1907) 497, 91 Pac. 369, 12 L. R. A. (N. S.) 554.

[86] The state "can not undo what has already been done, and it can not unmake contracts that have already been made, but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into." Chief Justice White, Sinking Fund Cases, 99 U. S. (1878) 700, at 721, 25 L. ed. 496. See also Thornton v. Duffy, 254 U. S. (1920) 361, 65 L. ed. 304; Mountain Timber Co. v. Washington, 243 U. S. (1920) 219, 61 L. ed. 685; Assaria State Bank v. Dolley, 219 U. S. (1911) 121, 55 L. ed. 123; Noble State Bank v. Haskell, 219 U. S. (1911) 104, 55 L. ed. 112; First State Bank v. Shallenberger, 172 Fed. (1909) 999. But similar sinking funds are also sustainable as an exercise of the police power. See especially the "sheep-fund" cases. Tenney v. Lenz, 16 Wis. (1863) 566; Van Horn v. People, 46 Mich. (1881) 183, 9 N. W. 246, 41 Am. Rep. 159; Cole v. Hall, 103 Ill. (1882) 30; Holst v. Roe, 39 Ohio St. (1883) 340, 48 Am. Rep. 459; Longyear v. Buck, 83 Mich. (1890) 236, 47 N. W. 234; McGlone v. Womack, 129 Ky. (1908) 274, 111 S. W. 688; State v. Anderson, 144

to underlie the decisions in the cases upholding screening laws for coal-mines,[87] and has been clearly stated as the basis upon which the semi-monthly payment laws have been upheld.[88] Of course, when the court can see some possible advantage to the corporation itself from the regulation, that is *prima facie* evidence that the burden is but small. Consequently, a railroad corporation can be compelled to contribute to the maintenance of a railroad commission,[89] to fence its right of way,[90] to construct

Tenn. (1920) 564, 234 S. W. 768. See also Sentell v. New Orleans &c. R. Co., 166 U. S. (1897) 698, 41 L. ed. 1169.

[87] Woodson v. State, 69 Ark. (1900) 521, 65 S. W. 465. See also cases in sec. 152, n. 47.

[88] "The inconvenience to the corporation to pay the wages semi-monthly could not be as great as it would be to those, whose actual necessities require the frequent payments, not to receive such payments." Justice Fraventhal, Arkansas Stave Co. v. State, 94 Ark. (1910) 27 at 35, 125 S. W. 1001, 27 L. R. A. (N. S.) 255, 140 Am. St. 103. See also Lawrence v. Rutland R. Co., 80 Vt. (1907) 370, 67 Atl. 1091, 15 L. R. A. (N. S.) 350, 13 Ann. Cas. 475, where it was said that the restriction on the corporation was only an indirect one. Cf. Leep v. St. Louis, I. M. &c. R. Co., 58 Ark. (1894) 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. 109; Skinner v. Garnett Gold Min. Co., 96 Fed. (1889) 735.

The Service Letter Law was of this nature. Prudential Ins. Co. v. Cheek, 259 U. S. (1922) 530, 66 L. ed. 1044.

[89] Charlotte, C. &c. R. Co. v. Gibbes, 27 S. Car. (1887) 385, 4 S. E. 49. See also Leep v. St. Louis, I. M. &c. R. Co., 58 Ark. (1894) 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. 109. See also p. 396, n. 11.

[90] Blair v. Milwaukee & Prairie du Chien R. Co., 20 Wis. (1866) 254; Durand v. New Haven & Northampton Co., 42 Conn. (1895) 211; Minneapolis & St. Louis R. Co. v. Beckwith, 129 U. S. (1889) 26, 32 L. ed. 585; Jeffersonville R. Co. v. Gabbert, 25 Ind. (1865) 431.

Laws requiring railroads to fence their rights of way are usually upheld. Missouri Pac. R. Co. v. Humes, 115 U. S. (1885) 512, 29 L. ed. 463; Minneapolis & St. Louis R. Co. v. Beckwith, 129 U. S. (1889) 26, 32 L. ed. 585; Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. (1893) 364, 37 L. ed. 769; New York Cent. &c. R. Co. v. Price, 159 Fed. (1908) 330; Gorman v. Pacific R. Co., 26 Mo. (1858) 441, 72 Am. Dec. 220; Derby v. Framingham & L. R. Co., 119 Mass. (1876) 516; Missouri River, Ft. S. &c. R. Co. v. Duckett, 20 Kans. (1870) 623; Kansas Pac. R. Co. v. Mower, 16 Kans. (1876) 573; Donovan v. Hannibal &c. R. Co., 89 Mo. (1886) 147, 1 S. W. 232; Shotwell v. St. Joseph & St. L. R. Co., 37 Mo. App. (1889) 654; Sullivan v. Oregon R. & Nav. Co., 19 Ore. (1890) 319, 24 Pac. 408; Sleadd v. Southern R. Co., 109 Ky. (1900) 214, 58 S. W. 581; Sanger v. Chesapeake &c. R. Co., 102 Va. (1903) 86, 45 S. E. 750; Cotton v. Wiscasset, W. &c. R. Co., 98 Maine (1904) 511, 57 Atl. 785; Mangold v. St. Louis, M. &c. R. Co., 116 Mo. App. (1906) 606, 92 S. W. 753; Chicago, I. & L. R. Co. v. Irons, 38 Ind. App. (1906) 196, 78 N. E. 207; Louisville &c. R. Co. v. Timmons, 116 Tenn. (1906) 29, 91 S. W. 1116; Claus v. Chicago Great Western R. Co., 136 Iowa (1907) 7, 111 N. W. 15; Bean v. Jasper &c. R. Co., 101 S. W. (Tex. Civ. App., 1907) 874;

cattle guards at crossings,[91] or to put in sidings where necessary to serve shippers;[92] because the railroad itself derives a benefit therefrom. When it does not appear that the improvement may not pay a reasonable profit or cause but a small loss, the same reasoning applies and it has been

Illinois Cent. R. Co. v. Davidson, 225 Ill. (1907) 618, 80 N. E. 250; Texas Cent. R. Co. v. Pruitt, 49 Tex. Civ. App. (1908) 370, 110 S. W. 966; Bridges v. Missouri, K. &c. R. Co., 132 Mo. App. (1908) 576, 112 S. W. 37; Sharp v. Quincy, O. & K. C. R. Co., 139 Mo. App. (1909) 525, 123 S. W. 507; Porter v. Illinois So. R. Co., 137 Mo. App. (1909) 293, 117 S. W. 680; Lynch v. Baltimore &c. R. Co., 240 Ill. (1909) 567, 88 N. E. 1034; Johnson v. Southern Pac. Co., 11 Cal. App. (1909) 278, 104 Pac. 713; Missouri &c. R. Co. v. State, 92 Ark. (1909) 1, 121 S. W. 930; Huffman v. Oregon R. & N. Co., 57 Wash. (1910) 494, 107 Pac. 362; Bernardi v. Northern Pac. R. Co., 18 Idaho (1910) 76, 108 Pac. 542; Deal v. St. Louis, I. M. & S. R. Co., 144 Mo. App. (1910) 684, 129 S. W. 50; Vandalia R. Co. v. Walker, 45 Ind. App. (1910) 702, 91 N. E. 607; Vandalia R. Co. v. Miller, 45 Ind. App. (1910) 366, 90 N. E. 907; Bridges v. Missouri, K. &c. R. Co., 159 Mo. App. (1911) 577, 141 S. W. 440; Hay v. St. Louis &c. R. Co., 161 Mo. App. (1912) 1, 142 S. W. 468; Michigan Cent. R. Co. v. Farrell, 52 Ind. App. 1912) 603, 99 N. E. 1026; Leete v. New York, N. H. &c. R. Co., 87 Conn. (1913) 57, 86 Atl. 760; St. Louis &c. R. Co. v. Higgs, 42 Okla. (1914) 171, 141 Pac. 10; Hartzell v. Alton, Granite &c. Tract. Co., 263 Ill. (1914) 205, 104 N. E. 1080; Missouri, O. &c. R. Co. v. Brown, 46 Okla. (1915) 735, 148 Pac. 1040; Nappi v. Grand Trunk R. Co., 78 N. H. (1916) 261, 99 Atl. 185; Penshorn v. International &c. R. Co., 186 S. W. (Tex. Civ. App., 1916) 868; Strong v. Oregon Short Line R. Co., 31 Idaho (1917) 48, 169 Pac. 179; Walker v. Southwest Missouri R. Co., 198 S. W. (Mo. App., 1917) 441; Hindman v. Oregon Short Line R. Co., 32 Idaho (1919) 133, 178 Pac. 837; Lynch v. Baltimore &c. R. Co., 240 Ill. (1919) 567, 88 N. E. 1034; Ex parte Hines, 205 Ala. (1920) 17, 87 So. 691. *Contra:* Colorado &c. R. Co. v. King, 51 Colo. (1911) 181, 116 Pac. 142.

[91] Bulkley v. New York &c. R. Co., 27 Conn. (1858) 479; Chicago, M. &c. R. Co. v. Milwaukee, 97 Wis. (1897) 418, 72 N. W. 1118; Suydam v. Moore, 8 Barb. (N. Y., 1850) 358.

The power to force railroads to provide cattle guards is well established. Missouri Pac. R. Co. v. Humes, 115 U. S. (1885) 512, 29 L. ed. 463; Gorman v. Pacific R. Co., 26 Mo. (1858) 441, 72 Am. Dec. 220; Illinois Cent. R. Co. v. Willenborg, 117 Ill. (1886) 203, 7 N. E. 698; Kansas City, M. &c. R. Co. v. Spencer, 72 Miss. (1894) 491, 17 So. 168; Grace v. Gulf &c. R. Co., 25 So. (Miss., 1899) 875; Missouri, K. & T. R. Co. v. Wetz, 97 Tex. (1904) 581, 80 S. W. 988; Yazoo & M. V. R. Co. v. Harrington, 85 Miss. (1905) 366, 37 So. 1016; Southwestern Tel. & Tel. Co. v. Krause, 92 S. W. (Tex. Civ. App., 1906) 431; Carrollton Short Line R. Co. v. Lipsey, 150 Ala. (1907) 570, 43 So. 836; State ex rel. v. Colorado So. N. O. &c. R. Co., 120 La. (1907) 9, 44 So. 905; Kansas City So. R. Co. v. Greer, 90 Ark. (1909) 531, 119 S. W. 1121; St. Louis &c. R. Co. v. Steele, 37 Okla. (1913) 536, 133 Pac. 209; Dwyer v. Chicago &c. R. Co., 41 S. Dak. (1908) 535, 171 N. W. 760. *Contra:* Atchison, T. & S. F. R. Co. v. Lyon County, 8 Kans. App. (1899) 597, 56 Pac. 140.

[92] Norfolk & W. R. Co. v. Public Serv. Commn., 265 U. S. (1924) 70, 68 L. ed. 904.

held a valid exercise of the repeal power to compel the corporation to make it.[93]

§ 160. On the other hand, where the cost to the corporation is considerable, and the benefit to the public is but small, an entirely different situation presents itself. While mill dam owners may be compelled under the power of repealing their franchise, to put in a fishway, because of the small cost of the improvement,[94] legislation compelling two fishways is unreasonable because there is no corresponding public advantage.[95] It is the same principle which underlies the decision of the courts in rejecting the Wisconsin berth law,[96] and declaring void acts designed to give free transportation on the railroads to small groups of individuals.[97] Chief Justice White indi-

[93] International Bridge Co. v. New York, 254 U. S. (1920) 126, 65 L. ed. 176; Chesapeake &c. R. Co. v. Public Serv. Commn., 242 U. S. (1917) 603, 61 L. ed. 520.

[94] Holyoke Co. v. Lyman, 15 Wall. (U. S., 1872) 500, 21 L. ed. 133. See also: Stoughton v. Baker, 4 Mass. (1808) 522, 3 Am. Dec. 236; Cottrill v. Myrick, 12 Maine (1835) 222; State v. Franklin Falls Co., 49 N. H. (1870) 240, 6 Am. Rep. 513; State v. Roberts, 59 N. H. (1879) 256, 47 Am. Rep. 199; Parker v. People, 111 Ill. (1884) 581, 53 Am. Rep. 643; West Point Water Power & L. I. Co. v. State, 49 Nebr. (1896) 218, 66 N. W. 6.

[95] Commonwealth v. Essex Co., 13 Gray (Mass., 1859) 239. Cf. State v. Glen, 7 Jones L. (52 N. Car., 1859) 321; Cornelius v. Glen, 7 Jones L. (52 N. Car., 1860) 512.

[96] This statute provided that if the upper berth in a Pullman were unoccupied the company should not lower it, but should give the occupant of the lower berth the entire space. Chicago, M. & St. P. R. Co. v. Wisconsin, 238 U. S. (1915) 491, 59 L. ed. 1423. Contrast this decision with Stephens v. Smith, 29 Vt. (1857) 160, where a law prohibiting a railroad conductor putting off between stations, passengers not paying their fares, was upheld under the repeal power.

[97] Delaware, L. &c. R. Co. v. Board of Public Utils. Commrs., 85 N. J. L. (1913) 28, 88 Atl. 849.

But in several cases ordinances requiring railroads to give free rides to public officers have been upheld. Policemen: Sutton v. New Jersey, 244 U. S. (1917) 258, 61 L. ed. 1117; Public Serv. R. Co. v. Board of Pub. Util. Commrs., 85 N. J. L. (1913) 123, 88 Atl. 818; Pennsylvania R. Co. v. Board of Pub. Util. Commrs., 84 N. J. L. (1913) 764, 88 Atl. 1103. *Contra:* Wilson v. United Tract. Co., 72 App. Div. (1902) 233, 76 N. Y. S. 203. Secretary to the Governor: Pennsylvania R. Co. v. Herrmann, 89 N. J. L. (1916) 582, 99 Atl. 404. The railroad may be forced to transport militiamen when under military orders for one cent per mile. State ex rel. v. Chicago, M. &c. R. Co., 118 Minn. (1912) 380, 137 N. W. 2. Laws requiring railroads to give free transportation to shippers have been held

cated that the South Dakota law, which required railroads to furnish cattle scales, was declared unconstitutional because the cost to the railroads would have been great and the public necessity was small.[98] To require the corporation, therefore, to expend large sums of money, or forfeit valuable property rights, for a trivial public advantage seems certain to be considered an unreasonable and arbitrary taking of the property of the stockholders without due process of law.[99]

Where there is a considerable public advantage, the courts tend to allow a large invasion of the rights of the corporation. This is shown by the cases upholding regulations of transportation companies. These corporations can be forced to combine in union depots,[1] to extend their lines if the service is needed,[2] to cease operating steam

void. Atchison, T. &c. R. Co. v. Campbell, 61 Kans. (1900) 439, 59 Pac. 1051; McCully v. Chicago, B. &c. R. Co., 212 Mo. (1908) 1, 110 S. W. 711.

[98] He declared that the order was "repugnant to the Fourteenth Amendment as a taking of its property without due process, since as a carrier no obligation rested upon it to put in the scales, it was pointed out that the test was whether the order was so arbitrary and unreasonable as to exceed the power of government, or was justified by the public necessities which the carrier could lawfully be compelled to meet." Great Northern R. Co. v. Cahill, 253 U. S. (1920) 71 at 72, 64 L. ed. 787.

[99] See likewise Metropolitan R. Co. v. MacFarland, 20 App. D. C. (1902) 421; Rochester &c. R. Co. v. Joel, 41 App. Div. (1899) 43, 58 N. Y. S. 346; Detroit v. Detroit &c. Plank Road Co., 43 Mich. (1880) 140, 5 N. W. 275; Vicksburg v. Vicksburg Waterworks Co., 202 U. S. (1906) 453, 50 L. ed. 1102; Wilson v. United Tract. Co., 72 App. Div. (1902) 233, 76 N. Y. S. 203; Sunderland Bros. Co. v. Chicago, B. & Q. R. Co., 104 Nebr. (1920) 319, 177 N. W. 156, 179 N. W. 546.

[1] Mayor v. Norwich &c. R. Co., 109 Mass. (1871) 103.

It is noteworthy, however, that if there is very little public advantage to be secured from the particular station consolidation which was ordered, the courts will declare it void on the ground that it is unreasonable. The doctrine of the balance of convenience also appears in cases involving the removal of old stations or the building of new, and those involving orders for greater train service. See sec. 149, n. 13, 14, 15.

[2] Metropolitan R. Co. v. MacFarland, 20 App. D. C. (1902) 421. See also: Wisconsin, M. &c. R. Co. v. Jacobson, 179 U. S. (1900) 287, 45 L. ed. 194; Public Serv. Commn. v. New York Cent. R. Co., 258 U. S. (1922) 621, 66 L. ed. 795; Minneapolis St. R. Co. v. Minneapolis, 189 Fed. (1911) 445; State ex rel. v. Duluth St. R. Co., 88 Minn. (1902) 158, 92 N. W. 516; State v. White Oak R. Co., 65 W. Va. (1909) 15, 64 S. E. 630; State v. Chicago, M. &c. R. Co., 115 Minn. (1911) 51, 131 N. W. 859; State ex rel. v. St. Paul City R. Co., 117 Minn. (1912) 316, 135 N. W. 976; Public Serv. Commn. v. New York R. Co., 77 Misc. (1912) 487, 136 N. Y. S. 720; Emporia v. Atchison, T. &c. R. Co., 88 Kans. (1913) 611,

trains on certain streets,[3] to honor transfers from independent contiguous lines,[4] to pave that portion of the streets occupied by the tracks,[5] and to grant half fare rates to children.[6] In each case the courts emphasized the great public advantage of the regulation which, it was pointed out, enabled such measures to be within the power to amend the charter grant of the corporation.[7]

129 Pac. 161; State ex rel. v. St. Paul R. Co., 122 Minn. (1913) 163, 143 N. W. 136; State ex rel. v. St. Paul City R. Co., 127 Minn. (1914) 191, 149 N. W. 195; State v. Pub. Serv. Commn., 77 Wash. (1914) 529, 137 Pac. 1057. *Contra:* People v. Chicago, W. D. R. R. Co., 118 Ill. (1886) 113, 7 N. E. 116. If the railroad is not a common carrier the rule does not apply. Harp v. Choctaw, O. &c. R. Co., 118 Fed. (1902) 169.

[3] Richmond R. Co. v. Richmond, 96 U. S. (1877) 529, 24 L. ed. 734; Grand Trunk Western R. Co. v. South Bend, 227 U. S. (1913) 544, 57 L. ed. 633.

[4] District of Columbia v. Capital Tract. Co., 41 App. D. C. (1913) 115. See also: Puget Sound Tract., L. & P. Co. v. Reynolds, 244 U. S. (1917) 574, 61 L. ed. 1325; Detroit United R. Co. v. Detroit, 248 U. S. (1918) 429, 63 L. ed. 341; Chicago Union T. Co. v. Chicago, 100 Ill. (1902) 484; Blume v. Interurban St. R. Co., 41 Misc. (1903) 171, 83 N. Y. S. 989; O'Reilly v. Brooklyn Heights R. Co., 179 N. Y. (1904) 450, 72 N. E. 517; Rosenberg v. Brooklyn Heights R. Co., 91 App. Div. (1904) 580, 86 N. Y. S. 871; Topham v. Interurban St. R. Co., 96 App. Div. (1904) 323, 89 N. Y. S. 298; Moskowitz v. Brooklyn Heights R. Co., 47 Misc. (1905) 119, 93 N. Y. S. 385; McLaughlin v. New York City. R. Co., 106 App. Div. (1905) 1, 94 N. Y. S. 653; Wells v. New York City R. Co., 122 App. Div. (1907) 488, 107 N. Y. S. 430; Charbonneau v. Nassau Elec. R. Co., 123 App. Div. (1908) 531, 108 N. Y. S. 105; Duke v. Metropolitan St. R. Co., 166 Mo. App. (1912) 121, 148 S. W. 166; Oklahoma R. Co. v. Powell, 33 Okla. (1912) 737, 127 Pac. 1080; Lowenstein v. International R. Co., 140 N. Y. S. (1913) 159; Goodman v. New York Rs. Co., 88 Misc. (1918) 95, 150 N. Y. S. (1914) 702; People ex rel. v. Public Serv. Commn., 167 App. Div. (1915) 279, 153 N. Y. S. 18; Ritter v. International R. Co., 159 N. Y. S. (1906) 870. But where the burden from the transfer requirements is great and really amounts to confiscation, it has been held contrary to due process. Banton v. Belt Line R. Co., 268 U. S. (1925) 413, 69 L. ed. 615.

[5] Sioux City St. R. Co. v. Sioux City, 138 U. S. (1891) 98, 34 L. ed. 898. See also sec. 149, n. 19. Note that it has been held that a street railroad may be compelled to sprinkle its tracks (Newcomb v. Norfolk W. St. R. Co., 179 Mass. (1901) 449, 61 N. E. 42), but an attempt to saddle the cost of street lighting was held unconstitutional. Helena Light & R. Co. v. Helena, 47 Mont. (1913) 18, 130 Pac. 446.

[6] When such rates will not seriously impair the earning power of the road they are upheld: San Antonio T. Co. v. Altgelt, 200 U. S. (1904) 304, 50 L. ed. 491; Interstate Consol. St. R. Co. v. Massachusetts, 207 U. S. (1907) 79, 52 L. ed. 111; Commonwealth v. Connecticut Valley St. R. Co., 196 Mass. (1907) 309, 82 N. E. 19. But see: Commonwealth v. Boston &c. R. Co., 212 Mass. (1912) 82, 98 N. E. 1075.

[7] See also Stevens v. Rutland & B. R. Co., 29 Vt. (1857) 545; People v. Beakes Dairy Co., 222 N. Y. (1918) 416, 119 N. E. 115.

§ 161. The influence of this balance of convenience as a measure of what is a reasonable regulation, is shown by the development of the decisions regarding grade crossings. In 1856 the New York court held that it was unreasonable to levy the entire cost of additional grade crossings upon the railroad, because such crossings were a detriment rather than an advantage to them, and because there was little relation to the public convenience.[8] Six years later, the Court of Appeals overruled the earlier decision in so far as it had declared that there was no public advantage in the establishment of grade crossings, but sustained the other portion of its reasoning by holding that the legislature could not make the railroad bear the expense of the crossing, where it also involved the destruction of a round-house.[9] The same year a case was presented to the Massachusetts court in which the railroad was required to pay but a proportionate share of the expense, and this was upheld without question, because the payment by the public of part of the costs was *prima facie* evidence of a considerable public advantage, and at the same time reduced the railroad's loss.[10] In 1894 the federal Supreme Court decided that in the removal of grade crossings there was an advantage to the public, and because they were inherently nuisances, the cost could be saddled on the party which had caused them; namely the railroad.[11] While the court did not take occasion to point out that it was advantageous to the railroad to be rid of the crossing, as well as beneficial to the public, they

The same rules have been recently extended to regulations of insurance companies. Thus companies may be required to insure all comers alike from automobile accident indemnity. This is to prevent discriminatory regulations being enforced by certain companies. In re Opinion of the Justices, 251 Mass. (1925) 569, 147 N. E. 681.

[8] Miller v. New York &c. R. Co., 21 Barb. (N. Y., 1856) 513. See also Thorpe v. Rutland & B. R. Co., 27 Vt. (1854) 140, 62 Am. Dec. 625.

[9] Albany Northern R. Co. v. Brownell, 24 N. Y. (1862) 345 at 351.

[10] Fitchburg R. Co. v. Grand Junction R. & Depot Co., 4 Allen (Mass., 1862) 198. See also People ex rel. v. Boston &c. R. Co., 70 N. Y. (1879) 569; Roxbury v. Boston &c. R. Corp., 6 Cush. (Mass., 1850) 424.

[11] New York &c. R. Co. v. Bristol, 151 U. S. (1894) 556, 38 L. ed. 269.

evidently did consider that the importance of the public benefit rendered the regulation a reasonable one.

§ 162. The close relation between the growth of due process of law as a limitation on the power to amend charters, and its growth as a limitation on the police power, is perhaps still better illustrated by the rate-fixing cases. In 1878 the Maryland court upheld a rate on coal, fixed under the reserved power, and distinctly disclaimed the doctrine that the reasonableness of the rate had any relation to its constitutionality.[12] In 1884 the Supreme Court of the United States upheld a rate of water charges fixed under the repeal power. In his opinion Chief Justice Waite made no mention of any test of reasonableness or balance of convenience.[13]

Four years later a change had come over the court, and although three cent railroad rate was upheld under the power to amend the charter, Justice Gray indicated that, unless the rate paid a reasonable dividend, it would be confiscatory and hence unconstitutional.[14] It is significant that this *dicta* should have followed so closely upon the development of a similar doctrine in regard to the police power, and is perhaps still more significant that it was first applied within a few years after a similar doctrine had been invoked in police power cases.[15] The *dicta* of

[12] American Coal Co. v. Consolidation Coal Co., 46 Md. (1876) 15. This was also true in Attorney General v. Chicago &c. R. Co., 35 Wis. (1874) 425; Bondholders v. Railroad Commrs., Fed. Cas. No. 1,625, (1874).

[13] Spring Valley Waterworks v. Schottler, 110 U. S. (1884) 347, 354, 28 L. ed. 173. See also St. Louis &c. R. Co. v. Ryan, 56 Ark. (1892) 245, 19 S. W. 839.

[14] Dow v. Beidelman, 125 U. S. (1888) 680, 681, 31 L. ed. 841. See also St. Louis &c. R. Co. v. Gill, 156 U. S. (1895) 649, 39 L. ed. 567.

[15] The lower federal courts applied it in the cases of Southern Pac. Co. v. Board of Railroad Commrs., 78 Fed. (1896) 236 (per Justice McKenna) and San Joaquin &c. R. Canal & Irr. Co. v. Stanislaus County, 113 Fed. (1902) 930 at 938 (per Justice Morrow). In both of these cases the rate as fixed was declared unconstitutional as unreasonable. In the latter case Justice Morrow said: "The state can not deprive the complainant of its property without due process of law or deny it the equal protection of the laws. These constitutional provisions can not be held subordinate to the constitutional power conferred upon the state legislature to alter, amend, or repeal general laws." Stanislaus County v. San Joaquin & K.

Justice Gray first became the basis of the Supreme Court decision in the script book case in 1899. A statute, requiring railroads to sell script books at a reduced rate, was held unconstitutional in view of the fact that it would reduce some fares to a confiscatory level. Furthermore, the court pointed out, the act benefited but a small portion of the public and hence the balance of convenience was strongly against it.[16]

§ 163. In view of this close correlation between the doctrines of due process as a limitation upon the police power and the reserved power, when viewed in their evolutionary aspects, it may very well be doubted if, in regulations of this nature the latter power adds anything to the general power of police regulation.[17] Certainly the theory of the courts, as evidenced in their decisions, is of the same general character in both cases.

The tendency of the courts to utilize due process of law to cover every sort of arbitrary invasion of private right is perhaps nowhere more clearly shown than in the development of the restrictions on the power to repeal charters. It may be specially noted that the court in this

R. Canal & Irr. Co., 192 U. S. (1903) 201, 48 L. ed. 406. See the *dicta* in Matthews v. Board of Corporation Commrs., 97 Fed. (1899) 400.

[16] Lake Shore &c. R. Co. v. Smith, 173 U. S. (1899) 684, 43 L. ed. 858. See also Limoneira Co. v. Railroad Commn., 174 Cal. (1917) 232, 162 Pac. 1033. Note that the New York court rejected such a law on the basis of the police power alone. Beardsley v. New York, L. E. &c. R. Co., 162 N. Y. (1900) 230, 56 N. E. 488.

Other cases in which similar laws were held void are: Watson v. Delaware L. &c. R. Co., 32 Misc. (1900) 311, 66 N. Y. S. 798; State v. Great Northern R. Co., 17 N. Dak. (1908) 370, 116 N. W. 89; State v. Bonneval, 128 La. (1911) 902, 55 So. 569. In the one case in which such a law was sustained the court stressed the fact that it would not seriously impair the earning power of the railroad. State v. Maine Cent. R. R., 77 N. H. (1914) 425, 92 Atl. 837.

[17] There is a *dicta* by Justice Rugers in State v. Brown & Sharpe Mfg. Co., 18 R. I. (1892) 16 at 35, 25 Atl. 246, to the effect that the reserved power adds something to the police power but the case can be well explained on the ground that there was great public benefit with but little interference with private right, it being a weekly payment case. Note the statement in Commonwealth v. Hock Age Mut. Ben. Assn., 10 Phila. (1874) 554. It is also significant that the reservation of repeal rights will be strictly construed. Minneapolis v. Minneapolis St. R. Co., 215 U. S. (1910) 417, 54 L. ed. 259.

type of case is not dealing with the formal requirements of due process at all. These would seem to be entirely met by a legislative repeal of the charter. Even when the corporation has apparently bargained away its fundamental rights of property, the courts insist on giving effect to due process of law. The fundamental requirements of this conception in conserving individual rights, whether as an individual or a member of a corporate agency, rest far beyond the formal requirements of an enactment in pursuance of a contract. They are embedded in the Anglo-American philosophy. They are part and parcel of the doctrine of vested rights. For this reason the courts have been compelled to look back of the thin veneer of the reserved clause to see if the change was really a radical one or one in accordance with the nature of the corporation; to see if the public good were to be served thereby; to see if the regulations imposed worked a disproportionate hardship on the owners of corporation stock in view of the advantage to the general welfare. In doing this justices have been compelled to bore to the hard-wood of fundamental principles which underlie our social and political organization. These principles are of the same fabric of which due process was originally made. It thus appears that the courts, in reflecting the inherent temperament of the American people, have been led to find in the Constitution a basis upon which to rest their principles in protecting private right. This basis they found, in exertions of the reserve power, to be the very one which had so conspicuously enabled the court to protect the people against unwarranted abuses of the police power; namely due process of law.

PART NINE.

DUE PROCESS AND PUBLIC PURPOSE.

CHAPTER XXI.

COOPERATIVE IMPROVEMENT AS A PUBLIC PURPOSE.

§ 164. The courts have been very slow in recognizing that due process of law included a requirement that the powers of government should be only exercised for public purposes. In general it may be said that this extension of the general words of the Fourteenth Amendment is a development of the last half century, if not indeed the last three decades. It was not until cases involving purpose in taxation and eminent domain began to come before the courts, that this line of development prospered.

There are a number of reasons why the courts should have been so slow in linking up taxation and eminent domain cases with the concept of due process of law. The clause which immediately follows the due process provision in the Fifth Amendment prohibits the taking of private property "for public use, without just compensation."[1] A similar provision is to be found in most of the state Constitutions,[2] some even going so far as to specifical-

[1] "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." United States Constitution, Amendment V.

[2] Ark. (1874) II, 22; Cal. (1879) I, 14; Conn. (1818) I, II; Del. (1897) I, 8; Idaho (1890) I, 14; Ill. (1870) II, 13; Iowa (1857) I, 18;

ly prohibit the taking of property for private use.[3] As a general rule the courts prefer to declare an unconstitutional law in violation of a specific provision rather than as contrary to a general one. It was hardly to be expected, therefore, that the courts would quickly develop due process as a limitation on the power of eminent domain so long as these specific restrictions remained in the constitution.

§ 165. A similar situation exists in regard to taxation. The purposes for which congress may levy taxes are strictly limited in the federal Constitution as follows: "to pay the Debts and provide for the Common Defence and general Welfare of the United States."[4] If the question of public purpose were to be raised in connection with federal taxation, the courts would only be going out of their way to place their decision on the Fifth Amendment.[5] The state Constitutions are even more explicit

Ky. (1891) B. R. 13; La. (1921) I, 2; Maine (1819) I, 21; Md. (1867) III, 40; Mass. (1920) D. R. 10; Mich. (1908) XIII, 1; Minn. (1857, 1896) I, 13; Miss. (1890) III, 17; Mont. (1889) III, 14; Nebr. (1920) I, 21; Nev. (1864, 1912) I, 8; N. J. (1844) I, 16; N. Mex. (1912) II, 20; N. Y. (1894) I, 7; N. Dak. (1889) I, 14; Ohio (1912) I, 19; Okla. (1907) II, 23, 24; Ore. (1857) I, 18; Pa. (1873) I, 10; R. I. (1842) I, 16; S. Car. (1895) I, 17; S. Dak. (1889) VI, 13; Tenn. (1870) I, 21; Texas (1876) I, 17; Utah (1895) I, 22; Vt. (1913) I, 2, 9; Va. (1902) IV, 58; W. Va. (1872) III, 9; Wis. (1848) 13; P. I. (1916) 3 cl. 1; P. R. (1917) 2 cl. 9.

See also N. H. (1912) I, 12; Fla. (1885) D. R. 12; Ind. (1851) I, 21. The last two mentioned states do not mention "public use" or "public purpose" in this connection. The only state constitutions which contain no general eminent domain provisions are N. Car. (1876) and Kans. (1859). But see Kans. (1859), XII, 4.

The provisions in the state constitutions together with former provisions are given in full in John Lewis, Treatise on the Law of Eminent Domain in the United States (Chicago, 1909), ch. II, secs. 9-50.

[3] Ala. (1901) I, 23; Ariz. (1912) II, 17; Colo. (1876) II, 14, 15; Ga. (1877) I, iii, par. I; Mo. (1875) II, 20; Wash. (1889) I, 16; Wyo. (1889) I, 32, 33.

[4] United States Constitution, art. I, sec. 8, cl. 1. See also: Ward v. Maryland, 12 Wall. (U. S., 1870) 418, 20 L. ed. 449; Binns v. United States, 194 U. S. (1904) 486, 48 L. ed. 932; United States v. Yuginovich, 256 U. S. (1921) 462, 65 L. ed. 1047.

For an excellent discussion of this clause see E. S. Corwin, "Spending Power of Congress," Harv. L. Rev., Vol. 36 (Mar., 1923), pp. 548-582.

[5] As a matter of fact very few cases have been brought before the courts involving the purposes for which taxes might be paid. Where it

regarding the purposes for which taxes must be levied. A considerable number declare that taxes must be "for public purposes,"[6] many provide that there shall be no grants or appropriations of public monies to private individuals or corporations;[7] and almost all contain provisions against the loaning of state credit to private enterprises.[8] All but two states have provisions which cover some part of this ground.[9]

It is significant that these provisions were not commonly found in the first state constitutions. The accepted view was that the legislature should have unrestricted power to determine the subjects, methods, and even the purposes of taxation. So seriously was this power abused,

has been raised in regard to congress, the Supreme Court has dodged the issue. Field v. Clark, 143 U. S. (1892) 649 at 695, 36 L. ed. 294; United States v. Realty Co., 163 U. S. (1896) 427 at 440, 41 L. ed. 215; Massachusetts v. Mellon, 262 U. S. (1923) 447, 67 L. ed. 1078.

[6] Ariz. (1912) IX, 1; Ga. (1877) VII, i, 1 (lists specific purposes); Ky. (1891) 171; La. (1921) X, 1; Mich. (1908) VIII, 25 (municipalities only); Minn. (1857, 1906) IX, 1; Mo. (1865) X, 3; Mont. (1899) XII, 11; N. Dak. (1889) XI, 176; Okla. (1907) X, 14; S. Dak. (1889) XI, 2; Tex. (1876) VIII, 3; Vt. (1913) I, 9; Wyo. (1889) XIII, 3.

The limitations on the power of taxation in the state constitutions are given in J. M. Gray, Limitations of the Taxing Power (San Francisco, 1906), pp. 140-178.

[7] Ariz. (1912) IX, 7; Cal. (1879) IV, 31; Colo. (1876) XI, 2; Ga. (1877) VII, xvi; Ill. (1870) IV, 20; Iowa (1857) VII, 1; La. (1921) IV, 12; Mo. (1875) IV, 46; Nev. (1864) VIII, 9; N. Mex. (1912) IX, 14; N. Y. (1894) VIII, 9; N. Dak. (1889) XII, 185; Okla. (1907) X, 15; S. Dak. (1889) XIII, 1; Tex. (1876) XVI, 6; Wyo. (1889) XVI, 6.

[8] Ala. (1901) IV, 93; Ariz. (1912) IX, 7; Ark. (1874) XVI, 1; Cal. (1879) IV, 31; XII, 13; Colo. (1876) XI, 1; Conn. (1818, 1877) Amend. XXV; Del. (1896) VIII, 4 (by 3-4 vote of each house); Fla. (1885) IX, 10; Ga. (1877) VII, v; Idaho (1890) VIII, 2; Ill. (1870) IV, 20; Ind. (1851) XI, 12; Iowa (1857) VII, 1; Ky. (1891) 179 (municipalities only); La. (1921) IV, 12; Maine (1819) IX, 14; Md. (1867) III, 34; Mass. (1920) 112; Mich. (1908) X, 12; Minn. (1857) IX, 10; Miss. (1890) XIV, 258; Mo. (1875) IV, 45; Mont. (1889) XIII, 1; Nebr. (1920) XIII, 3; Nev. (1864) VIII, 9; N. J. (1844) IV, vi, 3; N. Mex. (1912) IX, 14; N. Y. (1894) VII, 1, VIII, 9; N. Car. (1876) V, 4; N. Dak. (1889) XII, 185; Ohio (1912) VIII, 4; Okla. (1907) X, 15; Ore. (1857) XI, 5, 6, 7; Pa. (1873) IX, 6; S. Car. (1895) X, 6; S. Dak. (1889) XIII, 1; Tenn. (1870) II, 31; Tex. (1876) III, 50; Utah (1895) VI, 31; Va. (1902) XIII, 185; Wash. (1889) VIII, 5, XII, 9; W. Va. (1872) X, 6; Wis. (1848) VIII, 3; Wyo. (1889) XVI, 6.

The only states which are without this form of provision are N. H. (1912), R. I. (1842), Vt. (1913) and Kans. (1859). Kansas has a provision which approaches it in XI, 8.

[9] These are N. H. (1912) and R. I. (1842).

however, that it became evident that some restriction was necessary. It has already been pointed out that due process developed but slowly as a virile limitation upon the power of the legislature, and where it was applied it involved chiefly the procedural and classification aspects of the concept.[10] Some other restrictions were therefore imperative, and in the constitutions framed between 1830 and 1870 stringent provisions limiting the power of taxation became the rule. These provisions limiting the power of taxation have been retained in the fundamental law of most of the states although the courts have developed due process to cover the very situation which they were designed to meet. In this regard, as in many others, constitutional provisions tend to persist long after their usefulness has faded into the background. To this tendency may be attributed much of the bulkiness of our present day state constitutions.

The influence of these provisions upon the courts tended to retard the development of due process in the fields of taxation and eminent domain. It was not uncommon for a court to declare, during this period, that due process had no relation to these powers.[11] In fact *dicta* to this effect

[10] See chs. XII and XV.

[11] In People ex rel. v. Brooklyn, 4 N. Y. (1851) 419, 55 Am. Dec. 266, Justice Ruggles declared that the objections to the act "were founded on those clauses in the constitution which declare that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation. Neither of these inhibitions apply to taxation." Page 423.

"It can not be said that a citizen is deprived of his property when he is left in the undisturbed possession of it, whatever taxation may be imposed on it." C. J. Black in Sharpless v. Mayor of Philadelphia, 21 Pa. St. (1853) 147 at 167, 59 Am. Dec. 759. See also p. 182.

"We are not aware that this provision [the law of the land] of the bill of rights, which it is believed has been incorporated into the constitution of each of the several states of the Union, has ever been held to limit or in any way restrict the general taxing power exercised under and in conformity to the constitutional limitations on that subject." J. Walker in Johnson v. Stark, 24 Ill. (1860) 75 at 86.

In People v. Smith, 21 N. Y. (1860) 595, Justice Denio said, "The constitutional provision securing a trial by jury in certain cases, and that which declare that no citizen shall be deprived of his property without due process of law, have no application to the case. The jury trial can only be claimed as a constitutional right where the subject is judicial in its character. The exercise of the right of eminent domain stands on the

continued to appear well down the century. Perhaps the most notable statement was that of Justice Miller who declared that due process was only a procedural limitation on taxation and that it did not restrict the power of eminent domain at all.[12]

§ 166. Another reason why the courts hesitated to apply due process to these classes of cases is to be found in the development of the doctrine of implied limitations on legislative power. We have seen how potent the concepts of natural right, vested rights, the principles of free

same ground with the power of taxation. Both are emanations of the law making power. They are the attributes of political sovereignty, for the exercise of which the legislature is under no necessity to address itself to the courts. In imposing a tax or in appropriating the property of a citizen, or a class of citizens, for a public purpose, with a proper provision for compensation, the legislative act is itself due process of law; though it would not be if it should undertake to appropriate the property of one citizen for the use of another, or to confiscate the property of one person or a class of persons, or a particular description of property upon some view of public policy, where it could not be said to be taken for a public use." Pages 598, 599.

See also In re Washington Ave., 69 Pa. St. (1871) 352, 8 Am. Rep. 255, in which Justice Agnew declared: "I admit that the power to tax is unbounded by any express limit in the constitution—that it may be exercised to the full extent of the public exigency. I concede that it differs from the power of eminent domain, and has no thought of compensation by way of a return for that which it takes and applies to the public good, further than all derive benefit from the purpose to which it is applied." At p. 363.

See also Excelsior Planting and Mfg. Co. v. Green, 39 La. Ann. (1887) 455 at 464, 1 So. 873; Hunter v. Owens, 80 Fla. (1920) 812, 86 So. 839; Chicago v. Larned, 34 Ill. (1864) 203; Swan v. Williams, 2 Mich. (1852) 427; Hanson v. Vernon, 27 Iowa (1869) 28, per J. Cole dissenting, at p. 83, 1 Am. Rep. 216; Stewart v. Board of Suprs. Polk County, 30 Iowa (1870) 9 at 28, 1 Am. Rep. 238.

[12] "Whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." Davidson v. New Orleans, 96 U. S. (1877) 97 at 104, 24 L. ed. 616. See also, for the statement in regard to the power of eminent domain, p. 105. See the interpretation of this case in McCray v. United States, 195 U. S. (1904) 61, 49 L. ed. 98, and in Fallbrook Irrigation District v. Bradley, 164 U. S. (1896) 112 at 157, 158, 41 L. ed. 369, per Justice Peckham.

government, etc., had been as norms by which legislative action might be tested in regard to procedure and special legislation.[13] The same tendency is still more evident in cases involving public purpose in taxation.[14] When confronted with a particularly arbitrary exercise of the taxing power, the courts frequently contended that the inherent nature of a tax—an exaction for the public good—prohibited its use for private purposes.[15] It is evident that there was a very close connection between this line of argument and the concept of due process for in some of these same cases the decision is rested on both grounds,[16] and in others the whole matter is linked up with the "sacred rights of property" which it is declared are guaranteed in the fundamental law, or at least reserved from the general grant of power to the legislature.[17]

[13] Sections 81, 82, 100, 101.

For a critical summary of the courts' attitude toward implied limitations on the legislatures see C. G. Haines, "Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations on Legislatures," Tex. L. Rev., Vol. II (Apr., June, 1924), pp. 257-290, 387-421.

[14] See Bridgeport v. Housatonic R. Co., 15 Conn. (1843) 475 at 497, 498.

[15] "Taxation is bounded in its exercise by its own nature, essential characteristics and purpose. It must therefore visit all alike in a reasonably practicable way of which the legislature may judge, but within the just limits of what is taxation." In re Washington Ave., 69 Pa. St. (1871) 352 at 363, 8 Am. Rep. 255, per Justice Agnew.

See also People ex rel. v. Brooklyn, 4 N. Y. C. A. (1851) 419 at 428, 429, 55 Am. Dec. 266; Tide-Water Co. v. Coster, 18 N. J. Eq. (1866) 518, 90 Am. Dec. 634; Hammett v. Philadelphia, 65 Pa. St. (1870) 146, 3 Am. Rep. 615; Sharpless v. Mayor of Philadelphia, 21 Pa. St. (1853) 147, 59 Am. Dec. 759.

[16] Sweet v. Hulbert, 51 Bart. (N. Y., 1868) 312; Hanson v. Vernon, 27 Iowa (1869) 29 at 45; In re Washington Ave., 69 Pa. St. (1871) 352 at 363, 8 Am. Rep. 255.

[17] Clarke v. Rochester, 13 How. Pr. (N. Y., 1856) 204; State v. Wapello County, 13 Iowa (1865) 388; Hanson v. Vernon, 27 Iowa (1869) 29 at 41.

Justice Agnew in In re Washington Avenue, 69 Pa. St. (1871) 352, 8 Am. Rep. 255, declared a local assessment void because, "It offends against the clear intent and spirit of the Bill of Rights." (Page 362.) "When, therefore, the constitution declares in the ninth article, that among the inherent and indefeasible rights of men is that of acquiring, possessing and protecting property, that the people shall be secure in their possessions, from unreasonable seizures,—that no one can be deprived of his property unless by the judgment of his peers, or of the law of the land—that no man's property shall be taken or applied to public use without just

§ 167. Closely connected with this line of reasoning was that which appeared in some of the later cases involving the validity of special assessment statutes. Not infrequently these laws enabled a majority of the land-owners to exercise that power in order to make joint improvements. It was contended that, since the legislature could not constitutionally delegate its power,[18] such a grant of power to create assessment districts was void. This line of argument was presented by no less a constitutional lawyer than Joseph H. Choate in the Fallbrook irrigation case,[19] who contended that such a delegation was contrary to the concept of due process of law. The Supreme Court of the United States refused to accept this plea, although the California court had evidently considered it of some importance.[20]

compensation being made—that every man for an injury to his lands or goods shall have remedy by due course of law, and right and justice administered without sale, denial or delay—and that no law impairing contracts shall be made— and when the people, to guard against transgressions of the high powers delegated by them, declared that these rights are excepted out of the general powers of government, and shall for ever remain inviolate, they, for their own safety, stamped upon the right of private property, an inviolability which can not be frittered away by verbal criticism on each separate clause, nor the united fagot broken, stick by stick, until all its strength is gone." At 363.

Chancellor Zabriski in Coster v. Tide Water Co., 18 N. J. Eq. (1866) 54, declared, "There is no prohibition in the constitution of this state, or in any of the state constitutions, that I know of, against taking private property for private use. But the power is nowhere granted to the legislature. The constitution vests in the senate and general assembly the legislative, or law making power. They can make laws, the rules prescribed to govern our civil conduct. They are not sovereign in all things; the executive and judicial power is not vested in them. Taking the property of one man and giving it to another, is not making a law or rule of action; it is not legislation, it is simply robbery. This power was not necessary or useful to be given to the legislature for any of the purposes for which government was instituted; and it was not given. It is the principle of all free governments, that no right of the citizen should be surrendered to the sovereign that is not necessary for the purposes of government." Page 63.

[18] T. M. Cooley, Treatise on the Constitutional Limitations (Boston, 1890) 137.

[19] Fallbrook Irr. Dist. v. Bradley, 164 U. S. (1896) 112 at 139-141, 41 L. ed. 369. This line of argument was repudiated by the court at p. 178. See also the argument of counsel in Louisville &c. R. Co. v. Davidson, 33 Tenn. (1854) 637; Augusta Bank v. Augusta, 49 Maine (1860) 507.

[20] Justice McKinstry in Moulton v. Parks, 64 Cal. (1883) 166, 30 Pac. 613, pointed out, "The act provides for no judicial inquiry as to what lands will be benefited by a proposed work, nor does it contain any declaration

Probably the most common of the arguments used by the courts in declaring void acts which violated the concept of "public purpose" was derived from the restrictions upon the power of eminent domain which were to be found in nearly all of the state constitutions.[21] The courts asserted that the greater included the lesser, and since it was declared that property could be taken only for public use upon the payment of just compensation, it was evident that the people had intended to prohibit the taking for private use under any circumstances. In spite of the fact that there were obvious differences between a taking for taxation and for eminent domain, this line of argument secured a mighty foothold and probably, more than any other, facilitated the development of the concept of public purpose in taxation.[22]

It is evident, therefore, that the concept of public use in regard to the powers of taxation and eminent domain did not rise directly from due process of law. While the idea of the "law of the land" was gaining a foothold, this other notion developed quite apart from it. But the two questions appeared very frequently in the same cases,

by the state legislature that any specified lands will be benefited, nor provide that such declaration may be made by the supervisors, or by any officer or agent of the state, or county. When those in possession of more than half of the land by them specified file a petition they assert that they will be benefited by the proposed work, and they also attempt to determine that the owners of other lands will be benefited. They determine that the work will benefit all, and attempt to levy a tax upon others as well as themselves, which shall be expended in work of joint as well as several benefit. No man can be a judge in his own cause, and no man's property can be taken without due process of law. . . .

"One man in possession of 3,000 acres of land, which he believes will be protected by a levee, may thus decree that 5,999 acres (of which 2,999 are owned by one hundred other men) will be benefited by a levee, and arbitrarily adjudge the one hundred to pay almost half of the expense of building it. Under our constitution there never has been power in the legislature to delegate such legislative functions to interested individuals." At pp. 183, 184. See also Brandenstein v. Hoke, 101 Cal. (1894) 131, 35 Pac. 562; People ex rel. v. Goldfogle, 123 Misc. (1924) 399, 205 N. Y. S. 870.

21 See sec. 164, n. 2.

22 Clarke v. Rochester, 13 How. Pr. (N. Y., 1856) 204; see Coster v. Tide Water Co., 18 N. J. Eq. (1866) 54; Bradshaw v. Omaha, 1 Nebr. (1869) 16, at 19, 20.

due to the procedural questions involved, and this paved the way for a union of the two ideas later in the century. Great jumps in constitutional theory came but slowly, and the fusion between these concepts was a work of decades, not years.

§ 168. The problem of co-operative improvement as a valid public purpose arose in that line of cases involving special assessments. Here, as had been the case in the development of due process as a police power limitation,[23] the problem of equality in the burden imposed proved the entering wedge. If it be granted that private property cannot be taken except upon just compensation, the theory underlying all taxation must be that there is compensation given in the general benefits which are derived from the government.[24] Special assessments, of course, do not give any considerable benefit, in proportion to the amount collected, if the general governmental benefits only are considered. If they are to be supported on the benefit theory, it is obvious that there must be some peculiar benefit to the property assessed. If the drainage of a swamp will make the land more productive, if the paving of a street will make the abutting property more accessible, it may fairly be said that there are special advantages accruing to the property for which the owner, in justice, may be compelled to pay.

It must be remembered, however, that although in many

[23] See sec. 119.

[24] A curious statement of this principle is to be found in the Vermont Constitution of 1793 and 1913, ch. I, sec. 9. "That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service, when necessary, or an equivalent thereto, but no part of any person's property can be justly taken from him, or applied to public uses, without his own consent, or that of the Representative Body of the Freemen, nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent, nor are the people bound by any law, but such as they have in like manner assented to, for their common good; and previous to any law being made to raise a tax, the purpose for which it is to be raised ought to appear evident to the legislature to be of more service to the community than the money would be if not collected."

See Louisiana v. Pillsbury, 105 U. S. (1881) 278 at 295, 26 L. ed. 1090.

respects special assessments are similar to taxes, there are some important differences.[25] Since both are levied by public authority, there is an enforced collection in each case, although only the property is liable for the special assessment, while the owner may be personally held for the regular tax burden. Neither power may be used for purely private purposes and both, if they are to satisfy the demands of due process of law, must be levied in accordance with certain requirements of equality. The equality of special assessments, however, is merely an equality in particular localities or even among particular individuals, provided all are similarly situated. Hence it follows, that although taxes must be levied with regard to the political divisions of the state which are already established, special assessments, by their nature, are levied in districts especially established for that purpose. Because of these differences, it is seldom that the courts will look with favor upon a special assessment which imposes a continuing burden. In general it must be levied once for all.[26] It appears, therefore, that the two crucial points in the cases involving special assessments are the purpose of the improvement and the benefit to the property. Due process of law developed as a limitation upon the former of these questions only because the problem of equality kept it before the courts.

[25] See In the Matter of the Application of the Mayor of City of New York, 11 Johns. (N. Y., 1814) 77; Illinois & Michigan Canal v. Chicago, 12 Ill. (1851) 403; McBride v. Chicago, 22 Ill. (1859) 574; Peoria v. Kidder, 26 Ill. (1861) 351; Macon v. Patty, 57 Miss. (1879) 378, 34 Am. Rep. 451; Mt. Pleasant v. Baltimore &c. R. Co., 138 Pa. St. (1890) 365, 20 Atl. 1052, 11 L. R. A. 520; Board of Drain. Commrs. v. Graves County, 209 Ky. (1925) 193, 272 S. W. 387.

[26] An example of an exception to this rule is to be found in those cases where it is necessary to levy a continuing burden to effect the improvement, e. g., for the maintenance of pumping stations to drain swamps, or for the upkeep of sewers. Carson v. Brockton Sewerage Commrs., 182 U. S. (1901) 398, 45 L. ed. 1151; Taylor v. Crawford, 72 Ohio St. (1905) 560, 74 N. E. 1065. The courts, however, frown on this type of assessment. Sears v. Street Commrs. of Boston, 173 Mass. (1899) 350, 53 N. E. 876; Chicago v. Blair, 149 Ill. (1894) 310, 36 N. E. 829. See also sec. 170. For an excellent discussion of the differences between special assessments and taxes see the opinion of District Judge Clayton in St. Paul Tr. & Sav. Bank v. American Clearing Co., 291 Fed. (1923) 212.

§ 169. The cases involving special assessments present still another important angle. Perhaps nowhere is it possible to find a situation in which cases involving both taxation and eminent domain are presented with such frequency. If the assessment cannot be justified as an exercise of the power of taxation, the courts are frequently forced to consider it as an exercise of the power of expropriation. Thus it happens that sometimes the decision is placed on one ground and sometimes on another. In the majority of decisions, both powers are discussed indiscriminately. This forms a splendid example of the close relationship between these two powers of government. Indeed, so confused were the courts on this matter that it was nearly a half century before they were able to disentangle the threads of these two problems.[27]

The problem of special benefits in the levying of assessments has proved to be one of the most vexatious questions which has confronted the courts. In spite of the protest of the New York Supreme Court, that unless the levy was according to special benefits it could not be considered a "public tax,"[28] the Court of Appeals refused to follow suit and gave the legislature a wide range of discretion in the way in which the assessment might be levied.[29] On the other hand, several courts, including that of New Jersey, declared that special assessments might be levied only when the property would derive increased value from the improvement. If the assessment only con-

[27] An excellent example of the early difficulties which the courts had with this type of case is to be found in Sutton's Heirs v. Louisville, 5 Dana (Ky., 1837) 28.

[28] People ex rel. v. Brooklyn, 6 Barb. (N. Y., 1849) 209 at 215. See also People ex rel. v. Brooklyn, 9 Barb. (N. Y., 1850) 535.

[29] People ex rel. v. Mayor of Brooklyn, 4 N. Y. (1851) 419, 55 Am. Dec. 266. Contrast the attitude of the court here with its attitude in People ex rel. v. Batchellor, 53 N. Y. (1873) 128, 13 Am. Rep. 480, and in Stuart v. Palmer, 74 N. Y. (1878) 183, 30 Am. Rep. 289. Other cases following the same principles as the principal case are: Williams v. Cammack, 27 Miss. (1854) 209, 61 Am. Dec. 508; Egyptian Levee Co. v. Hardin, 27 Mo. (1858) 495, 72 Am. Dec. 276; Brewster v. Syracuse, 19 N. Y. (1859) 116; Springfield v. Gay, 12 Allen (Mass., 1866) 612; Daily v. Swope, 47 Miss. (1872) 367; People ex rel. v. Jefferson County Court, 55 N. Y. (1874) 604; In re Van Antwerp, 56 N. Y. (1874) 261.

tributed to still greater inequality, it could not be upheld.[30] In most of the cases the court felt the assessment was fair and no conflict developed.[31] That a very different problem was involved, however, is evident from the difficulties of Pennsylvania courts in developing a consistent rule to govern its decisions.[32]

The conflict between these two points of view was not presented to the United States Supreme Court until 1878.[33] At once it was evident that the New York position was making the stronger bid for favor. In Davidson v. New Orleans the court refused to consider the degree of benefit in spite of the protest of Justice Bradley, who

[30] Tide-Water Co. v. Coster, 18 N. J. Eq. (1866) 518, 90 Am. Dec. 634; Clapp v. Hartford, 35 Conn. (1868) 66; State v. Newark, 37 N. J. L. (1874) 415, 18 Am. Rep. 729; In re Market Street, 49 Cal. (1875) 546; Jones v. Board of Water Commrs., 34 Mich. (1876) 273; Thomas v. Gain, 35 Mich. (1876) 155, 24 Am. Rep. 535.

[31] Lexington v. McQuillan's Heirs, 9 Dana (Ky., 1840) 513, 35 Am. Dec. 159; Wright v. Boston, 9 Cush. (Mass., 1852) 233; Snyder v. Rockport, 6 Ind. (1855) 237; Hill v. Higdon, 5 Ohio St. (1855) 243, 67 Am. Dec. 289; Foster v. Wood, 9 Ohio St. (1859) 540; Weeks v. Milwaukee, 10 Wis. (1860) 242; Lumsden v. Cross, 10 Wis. (1860) 282; Garrett v. St. Louis, 25 Mo. (1857) 505, 69 Am. Dec. 475; Pleasant v. Kost, 29 Ill. (1863) 490; Scammon v. Chicago, 42 Ill. (1866) 192.

[32] Pennock v. Hoover, 5 Rawle (Pa., 1835) 291 (implied that the assessment was valid); McMasters v. Commonwealth, 3 Watts (Pa., 1834) 292 (Cost of street improvement and widening can be levied against abutting property); Extension v. Hancock Street, 6 Harris (Pa., 1851) 26 (assessments must be levied according to benefits as this one was); Schenley v. Allegheny, 25 Pa. (1854) 128 (assessment only justified as a fairer method of distributing burden than general tax); Philadelphia v. Philadelphia, W. &c. R. Co., 33 Pa. (1850) 41 (can not force railroad to pay for paving along its right of way for it can get no benefit); Hammett v. Philadelphia, 65 Pa. St. (1870) 146, 3 Am. Rep. 615 (can not take land for street and levy costs against abutting property; to do so is confiscation and violates inherent rights of man); In re Washington Ave., 69 Pa. St. (1871) 352 (assessment declared void because grossly disregarding benefits; violates due process of law); Western Pa. R. Co. v. Allegheny, 2 W. N. (Pa. Supp., 1875) 229 (can assess railroad for street improvement); Junction R. Co. v. Philadelphia, 88 Pa. (1879) 424 (can not assess railroad for street improvement for it can derive no benefit from it); Michener v. Philadelphia, 118 Pa. St. (1888) 535, 12 Atl. 174 (court will assume benefit to adjoining property holder in case of local assessment); Allegheny v. Western Pa. R. Co., 138 Pa. (1890) 375, 21 Atl. 763 (assumption that property is benefited does not apply to railroad for it is obvious that it can not be benefited).

[33] Willard v. Presbury, 14 Wall. (U. S., 1871) 676, 20 L. ed. 719, did not present the question of benefits disproportioned to the assessment.

clearly saw the importance of due process in this regard.[34] Six years later the court reaffirmed its position, although Justice Field indicated that he felt the assessment in the case at bar not particularly unjust.[35] In 1888 the court even went so far as to declare that "the determination of the taxing district and the manner of apportionment are all within the legislative power,"[36] and if there was any possibility that the lands assessed would be specially benefited the levy would be upheld.[37]

For ten years the court refused to extend the meaning

[34] 96 U. S. (1878) 97, 24 L. ed. 616. Justice Bradley in his concurring opinion declared, "We are entitled under the fourteenth amendment, not only to see that there is some process of law, but 'due process of law,' provided by the state law when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and objects of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'" Page 107.

[35] Hagar v. Reclamation Dist. No. 108, 111 U. S. (1884) 701, 28 L. ed. 569. Justice Field declared, "He who reaps the benefit must bear the burden." Page 706.

[36] Chief Justice Fuller in Walston v. Nevin, 128 U. S. (1888) 578 at 582, 32 L. ed. 544. In this case it was recognized that the burdens imposed were not particularly unjust or arbitrary.

[37] The New York Court of Appeals had declared a street assessment void because of lack of notice and hearing. Stuart v. Palmer, 74 N. Y. (1878) 183, 30 Am. Rep. 289. Subsequently, the legislature passed an act which levied the old assessment (with interest) and provided that it should be collected after a notice and hearing. This case brought up the whole question of legislative conclusiveness in the matter of special assessments. The levy was upheld by the United States Supreme Court, Justice Gray declaring, "The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact and when the legislature determines it in a case within its general power, its decision must of course be final. We can see in the decision reached possible sources of error and perhaps even injustice, but we are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits." Spencer v. Merchant, 125 U. S. (1888) 345 at 353, 31 L. ed. 763. See also Lombard v. West Chicago Park Commrs., 181 U. S. (1901) 33, 45 L. ed. 731.

But if there is no possibility of benefit the assessment is void. Lathrop v. Racine, 119 Wis. (1903) 461, 97 N. W. 192.

of due process in this type of cases. As late as 1896 the *dicta* of the earlier cases was repeated with approval,[38] although in each case the court seems to have been impressed with the fairness of the assessment.[39] At least the justices were not sure of their own ability to do better.[40]

§ 170. In 1898, however, an extreme case was presented to the court. In order to connect two streets, a block owned by a single individual had been cut through and the entire cost of condemning the right of way assessed against the owner. The court pointed out that this was really a case of condemnation without compensation under the guise of taxation and the levy totally disregarded the benefits of the improvement. So outrageous was the abuse in this case that the court, three judges dissenting, was induced to declare it void under due process of law.[41]

[38] Bauman v. Ross, 167 U. S. (1896) 548, 42 L. ed. 270.

[39] Thus in Bauman v. Ross, 167 U. S. (1896) 548, 42 L. ed. 270, considerable emphasis was laid on the fact that only one half of the cost of the new street was levied on the property owners. See also Lent v. Tillson, 140 U. S. (1890) 316, 35 L. ed. 419; Paulsen v. Portland, 149 U. S. (1893) 30, 37 L. ed. 637; Eldridge v. Trezevant, 160 U. S. (1896) 452, 40 L. ed. 490, involved the question of whether the Fourteenth Amendment repealed civil law rules in this regard in Louisiana, but here also the court seemed to feel that there was no great injustice done.

[40] Fallbrook Irr. Dist. v. Bradley, 164 U. S. (1896) 112, 41 L. ed. 369.

[41] Norwood v. Baker, 172 U. S. (1898) 269, 43 L. ed. 443. Justice Harlan declared, "It has been adjudged that the due process of law prescribed by that amendment requires compensation to be made or secured to the owner when private property is taken by a state or under its authority for public use." Page 277. "The exaction from the owner of the private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." *Ibid.*, p. 279. The essential principle of this case seems to have been applied two years earlier in a case involving the police power. The court held that under the guise of the police power a state could not expropriate the land of a railroad company. "This court . . . is unanimously of opinion, that the order in question, so far as it required the railroad corporation, to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law." Missouri Pac. R. Co. v. Nebraska, 164 U. S. (1896) 403 at 417, 41 L. ed. 489. This statement is by Justice Gray who dissented in the Norwood case. Cf. Stew-

As a result of this decision the court was flooded with special assessment cases, but in no case has the tax been so arbitrary that the court has been constrained to declare it void. The decision was very severely criticized,[42] and certain language used subsequently gives the impression that it has been overruled.[43] The decisions, however, can be easily reconciled. The more recent opinions have merely declared that it will require a grossly arbitrary case to induce the court to interfere with the assessment.[44] The court is loath to declare special assessments void because of the difficulty it would have in determining accurately the exact nature of the benefit which is derived from the improvement. But to conclude that obviously unjust and arbitrary assessments will not be controlled is

art v. Great Northern R. Co., 65 Minn. (1896) 515, 68 N. W. 208, 33 L. R. A. 427.

[42] C. K. Burdick, Law of the American Constitution (N. Y., 1922), pp. 596, 597.

[43] French v. Barber Asphalt Pav. Co., 181 U. S. (1901) 324, 45 L. ed. 879.

[44] Compare the decisions in Louisville &c. R. Co. v. Barber Asphalt Pav. Co., 197 U. S. (1905) 430, 49 L. ed. 819, with Martin v. District of Columbia, 205 U. S. (1907) 135 at 139, 51 L. ed. 743, and Wagner v. Leser, 239 U. S. (1915) 207, 60 L. ed. 230; Branson v. Bush, 251 U. S. (1919) 182, 64 L. ed. 215; Valley Farms Co. v. Westchester, 261 U. S. (1923) 155, 67 L. ed. 585; Butters v. Oakland, 263 U. S. (1924) 162, 68 L. ed. 228. The present attitude of the court is well summed up by the following statement of Justice Van Devanter:

"The legislature of a state may require that the cost of a local public improvement, such as the construction or reconstruction of a public road, be distributed over the lands particularly benefited and charged against them according to their value, their area or the benefits which they will receive; may itself determine what lands will be benefited and in what proportions they will share in the benefits, and may avail itself, for the purposes of that determination, of any information which it deems appropriate and sufficient, including such as may be afforded by reports and estimates made in prior assessment proceedings having the same object. Only where the legislative determination is palpably arbitrary, and therefore a plain abuse of power, can it be said to offend the due process of law clause of the Fourteenth Amendment. . . . And only where there is manifest and unreasonable discrimination in fixing the benefits which the several parcels will receive can the legislative determination be said to contravene the equal protection clause of that Amendment. . . .

"To justify an assessment of benefits to particular lands it is not essential that the benefits be direct or immediate . . . but it is essential that they have a better basis than mere speculation or conjecture. Kansas City So. R. Co. v. Road Imp. Dist. No. 6 [256 U. S. (1921) 658, 65 L. ed. 1151]." Kansas City So. R. Co. v. Road Imp. Dist. No. 3, 266 U. S. (1924) 379, at 386, 387, 69 L. ed. 335.

to ignore the whole current of constitutional development centering in due process of law.[45]

§ 171. In the cases involving special assessments for street improvements it is difficult to see how any question of public purpose could arise. The right to use both the power of eminent domain and the taxing power to establish and maintain highways is of such antiquity that no one seems to have seriously questioned it as not being for a public purpose.[46] Consequently the only questions

[45] On the question of special assessments see also, Illinois R. Co. v. Decatur, 147 U. S. (1892) 190, 37 L. ed. 132; Wight v. Davidson, 181 U. S. (1901) 371, 45 L. ed. 900; Shumate v. Heman, 181 U. S. (1901) 402, 45 L. ed. 922; Farrell v. West Chicago Park Commrs., 181 U. S. (1901) 404, 45 L. ed. 924; Webster v. Fargo, 181 U. S. (1901) 394, 45 L. ed. 912; Cass Farm Co. v. Detroit, 181 U. S. (1901) 396, 45 L. ed. 914; Detroit v. Parker, 181 U. S. (1901) 399, 45 L. ed. 917; Chadwick v. Kelley, 187 U. S. (1903) 540, 47 L. ed. 293; Martin v. District of Columbia, 205 U. S. (1907) 135, 51 L. ed. 743; Cleveland, C., C. &c. R. Co. v. Porter, 210 U. S. (1908) 177, 52 L. ed. 1012; O'Neill v. Leamer, 239 U. S. (1915) 244, 60 L. ed. 249; Houck v. Little River Drainage Dist., 239 U. S. (1915) 254, 60 L. ed. 266; Myles Salt Co. v. Iberia &c. Drainage Dist., 239 U. S. (1915) 478, 60 L. ed. 392; Gast Realty & Invest. Co. v. Schneider Granite Co., 240 U. S. (1916) 55, 60 L. ed. 523; Embree v. Kansas City & L. Blvd. Rd. Dist., 240 U. S. (1916) 242, 60 L. ed. 624; Withnell v. Ruecking Constr. Co., 249 U. S. (1919) 63, 63 L. ed. 479; Mt. St. Mary's Cem. Assn. v. Mullins, 248 U. S. (1919) 501, 63 L. ed. 383; Hancock v. Muskogee, 250 U. S. (1919) 454, 63 L. ed. 1081; Branson v. Bush, 251 U. S. (1919) 182, 64 L. ed. 215; Miller & Lux v. Sacramento & S. J. Drain. Dist., 256 U. S. (1921) 129, 65 L. ed. 859; Missouri Pac. R. Co. v. Western Crawford Rd. Imp. Dist., 266 U. S. (1924) 187, 69 L. ed. 237; Milheim v. Moffat Tunnel Imp. Dist., 262 U. S. (1923) 710, 67 L. ed. 1194.

[46] In regard to roads see: Rindge Co. v. Los Angeles County, 262 U. S. (1923) 700, 67 L. ed. 1186; Browning v. Hooper, 3 Fed. (2d) (1924) 160; Lindsay v. Commrs. of Streets, 2 Bay (S. Car., 1796) 38; McClenaghan v. Curwen, 6 Bin. (Pa., 1802) 509, 3 Yeates 362; Lexington v. McQuillan's Heirs, 9 Dana (Ky., 1840) 513; Ferris v. Bramble, 5 Ohio St. (1855) 109; Dronberger v. Reed, 11 Ind. (1858) 420; Glendenning v. Stahley, 173 Ind. (1910) 674, 91 N. E. 234; Bond v. Baltimore, 116 Md. (1911) 68, 82 Atl. 978; Prager v. Armstrong, 48 Pa. Super. Ct. (1911) 140; In re Bremerton, 73 Wash. (1913) 565, 132 Pac. 240; Sexton v. Elizabeth City, 169 N. Car. (1915) 385, 86 S. E. 344; Barnard v. Durrence, 22 Ga. App. (1918) 8, 95 S. E. 372; Jeffress v. Greenville, 154 N. Car. (1911) 490, 70 S. E. 919; In re Yesler Way, 162 Pac. (Wash., 1916) 536; Rowland v. Mercer County Trac. Co., 90 N. J. L. (1918) 82, 102 Atl. 814; State ex rel. v. Montevideo, 142 Minn. (1919) 157, 171 N. W. 314 (alley); Sipe v. Tarentum, 263 Pa. (1919) 338, 106 Atl. 637; Wright v. Quinn, 238 Mass. (1921) 439, 131 N. E. 294; Stephens Co. v. Myers Park Homes Co., 181 N. Car. (1921) 335, 107 S. E. 233; Harvey v. Warren, 212 Ala. (1925) 415, 102 So. 899; Getzen v. Sumter Co., 103 So. (Fla., 1925) 104.

On the same ground the use of eminent domain to widen streets has

which have been raised in these cases, concerning due process of law, have been those of procedure and classification. Nevertheless, the problem of degree of benefit

been sustained: In re City of New York, 167 N. Y. (1901) 624, 60 N. E. 1108; Clendaniel v. Conrad, 3 Boyce (Del., 1912) 549, 83 Atl. 1036, Ann. Cas. 1915B, 968; Tacoma v. Brown, 69 Wash. (1912) 538, 125 Pac. 940; Kincaid v. Seattle, 74 Wash. (1913) 617, 134 Pac. 504; Chicago v. Lord, 277 Ill. (1917) 397, 115 N. E. 543.

The road need not be a through or main highway: State v. Superior Court, 42 Wash. (1906) 521, 85 Pac. 256; In re University Ave., 82 Misc. (1913) 598, 144 N. Y. S. 1086; Kenly v. Washington County R. Co., 129 Md. (1916) 1, 98 Atl. 232. The power may be used if but one person is benefited, provided the way is open to the public: Sherman v. Buick, 32 Cal. (1867) 241, 91 Am. Dec. 577; Doctor v. Hartman, 74 Ind. (1881) 221; Warner v. Martin, 21 W. Va. (1883) 534; Phillips v. Watson, 63 Iowa (1884) 28, 18 N. W. 659; Towns v. Klamath, 33 Ore. (1898) 225, 53 Pac. 604; Sullivan v. Cline, 33 Ore. (1898) 260, 54 Pac. 154; Fanning v. Gilliland, 37 Ore. (1900) 369, 61 Pac. 636, 62 Pac. 209, 82 Am. St. 758; Madera v. Raymond Granite Co., 139 Cal. (1903) 128, 72 Pac. 915; Kirk-Christy Co. v. American Assn., 128 Ky. (1908) 668, 32 Ky. L. 1177, 108 S. W. 232; Miller v. Kramer, 148 Iowa (1910) 460, 126 N. W. 931; Mueller v. Courtland, 117 Minn. (1912) 290, 135 N. W. 996; Pitznogle v. Western Maryland R. Co., 119 Md. (1913) 673, 87 Atl. 917, 46 L. R. A. (N. S.) 319; State v. Superior Court, 82 Wash. (1914) 503, 144 Pac. 722; Crystal Park Co. v. Morton, 27 Colo. App. (1915) 74, 146 Pac. 566; Bashor v. Bowman, 133 Tenn. (1915) 269, 180 S. W. 326; Road Dist. No. 4 v. Frailey, 145 N. E. (Ill., 1924) 195.

In a number of cases the courts have found that the road was only for private use and have refused to permit eminent domain to be used: Taylor v. Porter, 4 Hill (N. Y., 1843) 140, 40 Am. Dec. 274; Shaver v. Starrett, 4 Ohio St. (1855) 494; Logan v. Stogdale, 123 Ind. (1890) 372, 24 N. E. 135, 8 L. R. A. 58; Latah County v. Peterson, 3 Idaho (1892) 398, 29 Pac. 1089, 16 L. R. A. 81; Denham v. Bristol, 108 Mass. (1871) 202; Apex Transp. Co. v. Garbade, 32 Ore. (1898) 582, 52 Pac. 573, 62 L. R. A. 513; Beaudrot v. Murphy, 53 S. Car. (1898) 118, 30 S. E. 825; Healy Lumber Co. v. Morris, 33 Wash. (1903) 490, 74 Pac. 681, 63 L. R. A. 820, 99 Am. St. 964; Clark v. Mitchell County, 69 Kans. (1904) 542, 77 Pac. 284, 66 L. R. A. 965; Arnsperger v. Crawford, 101 Md. (1905) 247, 61 Atl. 413, 70 L. R. A. 497; Chesapeake Stone Co. v. Moreland, 126 Ky. (1907) 656, 31 Ky. L. 1075, 104 S. W. 762, 16 L. R. A. (N. S.) 479; Fitzpatrick v. Warden, 157 Ky. (1914) 95, 162 S. W. 550; Anderson v. Smith-Powers Logging Co., 71 Ore. (1914) 276, 139 Pac. 736, L. R. A. 1916B, 1089; Boyd v. Ritter Lumber Co., 119 Va. (1916) 348, 89 S. E. 273; Leathers v. Craig, 228 S. W. (Tex. Civ. App., 1921) 995; Kingston v. Anderson, 300 Ill. (1922) 577, 133 N. E. 347; McCloskey v. Heinen, 266 S. W. (Tex. Civ. App., 1925) 193. But see: Robinson v. Swope, 12 Bush. (Ky., 1876) 21; Blackwell Lumber Co. v. Empire Mill Co., 28 Idaho (1916) 556, 155 Pac. 680; In re Poland Coal Co., 58 Pa. Super. Ct. (1914) 312; McIntosh Coal Co. v. Blue Grass Coal Co., 203 Ky. (1924) 802, 263 S. W. 346.

The same basis justifies the use of eminent domain in building public bridges: State ex rel. v. Eirick, 84 Ohio St. (1911) 503, 95 N. E. 1156; In re Yesler Way, 94 Wash. (1916) 427, 162 Pac. 536; State ex rel. v. Stevenson, 164 Wis. (1916) 569, 161 N. W. 1. The power may also be used

bears an indirect relation to public purpose. One of the ideas in the term "public purpose" is undoubtedly "use in common." When, therefore, taxation is levied for an object which the taxpayers cannot possibly enjoy in common it may well be questioned if there is a real public purpose.[47] The logical result of this reasoning is that if the benefit is totally disproportioned to the taxes paid, they must be held to be unconstitutional, but the courts seem never to have applied this line of reasoning. In any case it would require an extreme situation to warrant interference,[48] and the court will probably prefer to attack the problem from the view that it violates the equal protection of the law rather than to develop this obscure angle of the concept of public purpose.

to light public roads by electricity. Palmer v. Larchmont Elec. Co., 158 N. Y. (1899) 231, 52 N. E. 1092.

On the question of the use to which the road is put see the following quotation from Justice Sanford: "Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment. . . . A road need not be for a purpose of business to create a public exigency; air, exercise and recreation are important to the general health and welfare; pleasure travel may be accommodated as well as business travel; and highways may be condemned to places of pleasing natural scenery." Rindge Co. v. Los Angeles County, 262 U. S. (1923) 700, 67 L. ed. 1186.

For cases involving toll roads and bridges, see sec. 180, n. 7.

[47] This seems to be the basis of the reasoning in Bradshaw v. Omaha, 1 Nebr. (1869) 16. This case was practically overruled by Turner v. Althaus, 6 Nebr. (1877) 54, 55, although the court was still influenced by its reasoning; see p. 71. See also Anderson v. Hill, 54 Mich. (1884) 477, 20 N. W. 549; Covington v. Southgate, 54 Ky. (1854) 491; Cheaney v. Hooser, 48 Ky. (1848) 330; Morford v. Unger, 8 Iowa (1859) 82; People v. Bennett, 29 Mich. (1874) 451, 18 Am. Rep. 107.

[48] "To raise the constitutional question would require an extreme case, where no apportionment of the tax with reference to benefit should be attempted, and no discretion on the subject exercised, but one set of individuals or one district should be confessedly and arbitrarily required to pay for benefits conferred upon others who bore no proportion of the burden. No such question arises where a tax is imposed upon a particular locality to aid in a public purpose which the legislature may reasonably regard as a benefit to that locality as well as to the state at large," per Justice Rapallo in Gordon v. Cornes, 47 N. Y. (1872) 608 at 612. State ex rel. v. Haben, 22 Wis. (1868) 660, seems to be only supportable on the ground that there was no public purpose for the locality. See also Henderson v. Sibley, 28 Minn. (1881) 515, 11 N. W. 91; Agawam v. Hampden, 130 Mass. (1881) 528; Keene v. Roxbury, 126 Atl. (N. H., 1924) 7.

It has been pointed out by the Mississippi court[49] that the problem of the degree of benefit from an assessment bears a somewhat more direct relation to public purpose than that inhering in the equality concept itself. It is to be assumed that the only purpose involved in a special assessment is the enhancement of the value of the property, it may well be doubted if it can be said to be for the public benefit. During the last half of the nineteenth century the device of special assessment was grossly abused and very frequently the benefits which were expected to accrue to a particular piece of land failed to materialize. Where the special benefits are hazardous, it seems certain that the special assessment can only be justified on the ground of some other public advantage. But even if it be admitted that there is no question regarding the benefits which the improvement will bring to a particular piece of property, it may still be questioned if the legislature has power to force an individual to improve his own economic position irrespective of the general good. Could the state, for example create a special assessment district for house painting?[50] It seems almost self-evident that "power does not exist in a constitutional government to compel a person to improve his estate for his own private benefit."[51]

It seems therefore, that there is a real connection between equality and public purpose in taxation. To justify a special assessment it is necessary that there be some real public object to be served by it. Where that object is the facilitation of communication, it cannot be doubted that it is public in nature, but there are a number of other purposes which have fully as much relation to the common good. Where several objects are served by a single improvement, the case for its validity is, of course, very much strengthened.

[49] Macon v. Patty, 57 Miss. (1879) 378.

[50] St. Paul Tr. & Sav. Bank v. American Clearing Co., 291 Fed. (1923) 212.

[51] Macon v. Patty, 57 Miss. (1879) 378 at 397.

§ 172. Local assessments for the purpose of building sidewalks might well be upheld merely because they give the public greater facilities for communication, in the same way that the paving of streets does.[52] The Pennsylvania court, however, sustained this type of improvement as an exercise of the police power, and held that a railroad could be forced to provide sidewalks around its depots. Unless the sidewalks were built the property might easily become a public nuisance, and since no one has the right to maintain a nuisance, the city could force its abatement in advance.[53] This improvement may also be sustained on the ground the property owner has special rights in the sidewalk.[54]

If it can be shown that the improvement bears a direct relation to the public health, the case for upholding it is almost perfect. Assessments for the building of sewers have been upheld on the ground that the protection of the health of the public has always been a legitimate object of government and all the powers of the state may be utilized to secure that object.[55] A similar basis in the

[52] Macon v. Patty, 57 Miss. (1879) 378; Weeks v. Milwaukee, 10 Wis. (1860) 242; Wilmington v. Yopp, 71 N. Car. (1874) 76; Kankakee Stone & Lime Co. v. Kankakee, 128 Ill. (1889) 173, 20 N. E. 670; Job v. Alton, 189 Ill. (1901) 256, 59 N. E. 622; Cain v. Tyler, 261 S. W. (Tex. Com. App., 1924) 1018. On the use of eminent domain for sidewalks see: Sharpless v. Longport, 79 N. J. L. (1910) 279, 75 Atl. 744; Wanamaker v. Schuylkill River E. S. R. Co., 244 Pa. (1914) 214, 90 Atl. 561.

[53] Mt. Pleasant Borough v. Baltimore &c. R. Co., 138 Pa. (1890) 365, 20 Atl. 1052.

[54] Hedden v. Verona, 82 N. J. L. (1912) 736, 82 Atl. 880; Bloom v. Orange, 91 N. J. L. (1918) 376, 103 Atl. 395. Other cases involving sidewalk assessments are: Dyer v. Woods, 166 Ind. (1906) 44, 76 N. E. 624; Bassett v. Ocean City, 118 Md. (1912) 114, 84 Atl. 262; Block v. Patrick, 35 Okla. (1913) 408, 130 Pac. 588; Anderson v. Ocala, 67 Fla. (1914) 204, 64 So. 775, 52 L. R. A. (N. S.) 287; Hyattsville v. Smith, 105 Md. (1907) 318, 66 Atl. 44; State v. Burnes, 124 Minn. (1914) 471, 145 N. W. 377; Shultise v. Taloga, 42 Okla. (1914) 65, 140 Pac. 1190.

[55] Paulsen v. Portland, 149 U. S. (1893) 30, 37 L. ed. 637; Wright v. Boston, 9 Cush. (Mass., 1852) 233; Brewster v. Syracuse, 19 N. Y. (1859) 116; Clapp v. Hartford, 35 Conn. (1868) 66; Cleveland v. Tripp, 13 R. I. (1880) 50; Watson v. New Milford, 72 Conn. (1900) 561, 45 Atl. 167; People ex rel. v. Pitt, 169 N. Y. (1902) 521, 62 N. E. 662; Harris v. Saratoga Springs, 171 App. Div. (1916) 977, 152 N. Y. S. 73. Indeed, these cases indicate that greater latitude may be allowed in the assessment of costs in this type of cases than in others. But see: Thomas v. Gain, 35

protection of public health forms the legal justification of street sweeping[56] and sprinkling.[57] In most of these cases, however, the essential question before the court was either the fairness of the assessment or the validity of the method of its collection, rather than the question of the purpose for which the levy was made.

§ 173. A more difficult question arose in connection with the compulsory construction of drains to improve agricultural lands. Here the improvement of public health was only an incidental matter, the principal purpose of the assessment being to increase the value of the land. Many of the cases involving the question turn really upon the degree of benefit to the land drained and so are not instructive from the point of view of public purpose.[58] In 1860, however, the Massachusetts court was directly con-

Mich. (1876) 155, 24 Am. Rep. 535; Park Ave. Sewers, 169 Pa. St. (1895) 433, 32 Atl. 574; People ex rel. v. Desmond, 186 N. Y. (1906) 232, 78 N. E. 857; Sears v. Street Commrs. of Boston, 173 Mass. (1899) 350, 53 N. E. 876.

Other cases involving sewer assessments are: Gleason v. Waukesha Co., 103 Wis. (1899) 225, 79 N. W. 249; McGhee v. Walsh, 249 Mo. (1913) 266, 155 S. W. 445; In re East Bottoms Drain. & L. Dist., 305 Mo. (1924) 577, 259 S. W. 89; Mt. St. Mary's Cemetery Assn. v. Mullins, 248 U. S. (1919) 501, 63 L. ed. 383; Carson v. Sewer Commrs. of Brocton, 182 U. S. (1901) 398, 45 L. ed. 1151; Granite State Land Co. v. Hampton, 77 N. H. (1914) 179, 89 Atl. 842.

If necessary eminent domain may be used to build sewers: Valparaiso v. Hagen, 153 Ind. (1899) 337, 54 N. E. 1062, 48 L. R. A. 707, 74 Am. St. 305; State ex rel. v. Superior Court, 44 Wash. (1906) 476, 87 Pac. 521; Twin Falls v. Stubbs, 15 Idaho (1908) 68, 96 Pac. 195; Cunningham v. Ponca City, 27 Okla. (1911) 858, 113 Pac. 919.

[56] Reinken v. Fuehring, 130 Ind. (1881) 382, 30 N. E. 414.

[57] Illinois refuses to allow special assessment districts to be formed for this purpose. Chicago v. Blair, 149 Ill. (1894) 310, 36 N. E. 829. Even in that state, however, the publicity of the purpose is fully recognized. See also State v. Reis, 38 Minn. (1888) 371, 38 N. W. 97; Sears v. Board of Aldermen of Boston, 173 Mass. (1899) 71, 53 N. E. 138; Phillips Academy v. Andover, 175 Mass. (1900) 118, 55 N. E. 841; Lafayette v. Tanner, 149 La. (1921) 430, 89 So. 314.

[58] This is the case in Cypress Pond Drain. Co. v. Hooper, 59 Ky. (1859) 350; Reeves v. Wood County, 8 Ohio St. (1858) 333; Springfield v. Gay, 12 Allen (Mass., 1866) 612; Ross v. Davis, 97 Ind. (1885) 79; Wishmier v. State, 97 Ind. (1884) 160; Colfax Highway Commrs. v. East Lake Fork Drain. Dist., 127 Ill. (1889) 581, 21 N. E. 206; Jackson v. Breeland, 103 S. Car. (1915) 184, 88 S. E. 128. See also the more recent cases of Myles Salt Co. v. Iberia &c. Drain. Dist., 239 U. S. (1916) 478, 60 L. ed. 392; Miller v. Sacramento &c. Drain. Dist., 256 U. S. (1921) 129, 65 L. ed. 859.

fronted with the problem of conflicting public benefits in the case of Talbot v. Hudson.[59] It was contended that the legislature in condemning a mill right was acting primarily for the benefit of certain farmers rather than for the general benefit. The court refused to be disturbed by the fact that the law might work to the special benefit of the individuals.[60] The topography of the country which would be drained, the increased productivity which would result, and the consequent prosperity which might be expected to result from the act, were considered by the court as evidence of the public purpose involved.[61] The crucial point in the case, however, was the fact that the mill-owner had secured the right to overflow the land by the exercise of the power of eminent domain. Having given him the power to take the land for a public purpose,[62] the legislature could take that power from him when they found a greater public purpose to be gained thereby. When two conflicting interests are presented to the legislature, it could hardly be questioned that that body can choose which of them is for the greater public benefit.

This question was not involved in the case which came up in New Jersey six years later, and consequently it pre-

[59] 16 Gray (Mass., 1860) 417. The statute authorized commissioners to reduce the height of a dam thirty-three inches. This would in effect destroy the value of a mill, but at the same time it would release a large section of valuable land for irrigation by draining the mill-pond.

[60] "Many enterprises of the highest public utility are productive of great and immediate benefits to individuals. A railroad or canal may largely enhance the value of private property situated at or near its termini; but it is not for that reason any less a public work for the construction of what private property may well be taken." Per Chief Justice Bigelow, Talbot v. Hudson, 16 Gray (Mass., 1860) 417 at 423.

[61] "Everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community." Per Chief Justice Bigelow in Talbot v. Hudson, 16 Gray (Mass., 1860) 417 at 425.

[62] For a review of the validity of the cases involving mill acts see Head v. Amoskeag Mfg. Co., 113 U. S. (1885) 9, 28 L. ed. 889; Cooley, Constitutional Limitations (Boston, 1890) 657-660; Lewis Eminent Domain (3d ed.), secs. 275-280.

sented still more directly the question of public purpose.[63] Upon the first hearing the court of equity declared that the act was principally for the benefit of the drainage company which was to build the drain. In particular, the court objected to levying an assessment to pay a profit to a private company.[64] After a rehearing however, the court found that only a fair profit had been allowed the company, and without such inducement the drainage probably could not be effected. Consequently since marsh lands hindered transportation[65] and endangered the public health, both the power of eminent domain and taxation could be used to drain them.[66] In neither opinion was any mention made of due process of law, for the New Jersey constitution has never contained that protection.[67]

[63] There had been two earlier cases involving public purpose and drainage, but the case discussed has always been considered the leading one of this period. See Hartwell v. Armstrong, 19 Barb. (N. Y., 1854) 166; Anderson v. Kerns Drain. Co., 14 Ind. (1860) 199, 77 Am. Dec. 63. Both of these cases had rested on the public health contention.

[64] Coster v. Tide Water Co., 18 N. J. Eq. (1866) 54. The court pointed out that even if the act were to be considered a police regulation for the public health, the profit for the company could not be justified on that ground.

[65] This was one of the bases of the opinion in Tide-Water Co. v. Coster, 18 N. J. Eq. (1866) 518, 90 Am. Dec. 634; State ex rel. v. Polk County, 87 Minn. (1902) 325, 92 N. W. 216.

[66] Tide-Water Co. v. Coster, 18 N. J. Eq. (1866) 518, 90 Am. Dec. 634. The court refused to reverse its earlier decision, because it found that the assessment had not been levied according to the actual benefits of the improvement. Hence it was really a confiscatory measure even though it was for the public benefit. See also In re Drainage of Lands, 35 N. J. L. (1872) 497; State v. Blake, 36 N. J. L. (1872) 442; Norfleet v. Cromwell, 70 N. Car. (1874) 634, 16 Am. Rep. 787; In re Ryers, 72 N. Y. (1878) 1, 28 Am. Rep. 88; Wurts v. Hoagland, 114 U. S. (1885) 606, 29 L. ed. 229; Lien v. Norman County, 80 Minn. (1900) 58, 82 N. W. 1094; State ex rel. v. Polk County, 87 Minn. (1902) 325, 92 N. W. 216.

[67] The use of the power of eminent domain for drainage purposes has been sustained by most courts: Orr v. Allen, 245 Fed. (1917) 486; Cleveland, C., C. &c. R. Co. v. Polecat Drain. Dist., 213 Ill. (1904) 83, 72 N. E. 684; Sisson v. Buena Vista County, 128 Iowa (1905) 442, 104 N. W. 454, 70 L. R. A. 440; Porter v. Armstrong, 139 N. Car. (1905) 179, 51 S. E. 926; Bradbury v. Vandalia Levee & D. Dist., 236 Ill. (1908) 36, 86 N. E. 163, 19 L. R. A. (N. S.) 991, 15 Ann. Cas. 904; Sanderlin v. Luken, 152 N. Car. (1910) 738, 68 S. E. 225; State ex rel. v. Powers, 124 Tenn. (1911) 553, 137 S. W. 1110; Wilson v. Compton Bond &c. Co., 103 Ark. (1912) 452, 146 S. W. 110; Shelton v. White, 163 N. Car. (1913) 90, 79 S. E. 427; Pierce County v. Thompson, 82 Wash. (1914) 440, 144 Pac. 704; Williams v. Wedding, 165 Ky. (1915) 361, 176 S. W. 1176; State ex rel. v. Eicher,

In spite of that fact, it was out of these cases that the courts of other states, and finally the United States Supreme Court developed due process as a limitation on the purpose of assessments in drainage cases.[68]

§ 174. The public health theory is reflected throughout the line of decisions.[69] So close is this exercise of the

178 S. W. (Mo., 1915) 171; Grimm v. Elkhorn Valley Drain. Dist., 98 Nebr. (1915) 260, 152 N. W. 374; Reclamation Dist. No. 1500 v. Superior Court, 171 Cal. (1916) 672, 154 Pac. 845; Almand v. Board of Drain. Commrs., 147 Ga. (1918) 532, 94 S. E. 1028; Carter v. Griffith, 179 Ky. (1918) 164, 200 S. W. 369; Drainage Dist. No. 7 v. Bernards, 89 Ore. (1918) 531, 174 Pac. 1167; Dickerson v. Tri-County Drain. Dist., 138 Ark. (1919) 471, 212 S. W. 334; State v. Williams, 43 Nev. (1919) 290, 185 Pac. 459; Hunt Drain. Dist. v. Harness, 317 Ill. (1925) 292, 148 N. E. 44; In re Scappoose Drain. Dist., 237 Pac. (Ore., 1925) 684. *Contra*, where for benefit of but one mine; Cummings v. Peters, 56 Cal. (1880) 593. But see Clark v. Nash, 198 U. S. (1905) 361, 49 L. ed. 1085.

[68] See particularly Hagar v. Yolo County, 47 Cal. (1874) 222; Hagar v. Reclamation Dist. No. 108, 111 U. S. (1884) 701, 28 L. ed. 569.

[69] In cases involving the use of eminent domain by drainage districts, the public health theory has also played an important part: State ex rel. v. Polk County, 87 Minn. (1902) 325, 92 N. W. 216, 60 L. R. A. 161; Laguna Drain. Dist. v. Charles Martin Co., 144 Cal. (1904) 209, 77 Pac. 933; Miller v. Jensen, 102 Minn. (1907) 391, 113 N. W. 914; State ex rel. v. Hanson, 80 Nebr. (1908) 724, 115 N. W. 294.

In those cases where statutes authorizing districts to use this power have been declared void the court has generally insisted that there was no relation to public health in the particular project proposed. Nickey v. Stearns Ranchos Co., 126 Cal. (1899) 150, 58 Pac. 459; Webb v. Lucas, 125 Minn. (1914) 403, 147 N. W. 273; State ex rel. v. Rockfort, 102 Minn. (1907) 442, 114 N. W. 244.

Although there are numerous *dicta* to the effect that lands may be drained if the only purpose is to reclaim them the cases can all be explained on other grounds. See: Head v. Amoskeag Mfg. Co., 113 U. S. (1884) 9, 28 L. ed. 889; Lewis County v. Gordon, 20 Wash. (1898) 80, 54 Pac. 779; State ex rel. v. Polk County, 87 Minn. (1902) 325 at p. 335, 92 N. W. 216, 60 L. R. A. 161. In many cases the question of public purpose is not discussed. See: Houck v. Little River Drain. Dist., 239 U. S. (1915) 254, 60 L. ed. 266; Lake Shore &c. R. Co. v. Clough, 242 U. S. (1917) 375, 61 L. ed. 374; In re Tuthill, 163 N. Y. (1900) 133, 57 N. E. 303; Burguieres v. Sanders, 111 La. (1903) 109, 35 So. 478; Pittsburgh, C., C. &c. R. Co. v. Hodge, 175 Ind. (1911) 669, 94 N. E. 324; Hackney v. Elliott, 23 N. Dak. (1912) 373, 137 N. W. 433; Munn v. Greene County, 161 Iowa (1913) 26, 141 N. W. 711; Jackson v. Breeland, 103 S. Car. (1916) 184, 88 S. E. 128; Burr v. Beaver Dam Drain. Dist., 145 Ark. (1920) 51, 223 S. W. 362; Bannerman v. Catts, 80 Fla. (1920) 170, 85 So. 336; In re Valley Center Drain. Dist., 64 Mont. (1922) 545, 211 Pac. 218. On the other hand there are a number of cases in which it was said that reclamation alone would not justify special assessments for this purpose. Anderson v. Kerns Drain. Co., 14 Ind. (1860) 199, 77 Am. Dec. 63; People v. Supervisors of Saginaw, 26 Mich. (1872) 22; In re Drainage along Pequest River, 41 N. J. L. (1879) 175; In re Eureka Basin Warehouse & Mfg. Co., 96 N. Y. (1884) 42.

power of assessment to the police power,[70] and so obvious were the public benefits to be derived from its exercise, that Justice Miller, speaking for the federal Supreme Court, did not think it worth while to discuss the question in Davidson v. New Orleans.[71] Justice Bradley was not satisfied with the narrow attitude of the court and in a vigorous dissent stated very clearly the role which due process was destined to play in questions of public purpose.[72] The influence of this statement is evident in the opinions sustaining the California drainage act. The Supreme Court of California declared that the act would promote the public health and hence was for the common good;[73] a viewpoint which was adopted directly by Justice Field when the law was presented to the Supreme Court of the United States.[74]

[70] This was emphasized in Brown v. Keener, 74 N. Car. (1876) 714. In this case it was held that the payment might be in labor as well as in money. See also State v. Blake, 36 N. J. L. (1872) 442; Mason City & Ft. D. R. Co. v. Wright County, 144 Iowa (1909) 10, 121 N. W. 39.

[71] 96 U. S. (1878) 97, 24 L. ed. 616. The opinion implied, however, that the assessment must be for a "public use," pp. 104, 105.

[72] "We are entitled under the Fourteenth Amendment, not only to see that there is some process of law, but 'due process of law,' provided by the state law when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'" Davidson v. New Orleans, 96 U. S. (1878) 97 at 107, 24 L. ed. 616.

[73] "We think the power of the legislature to compel local improvements, which, in its judgment, will promote the health of the people and advance the public good, is unquestionable. In the exercise of this power it may abate nuisances, construct and repair highways, open canals for irrigating arid districts, and perform many other similar acts for the public good, and all at the expense of those who are to be chiefly and more immediately benefited by the improvement." Justice Crocket in Hager v. Yolo County, 47 Cal. (1874) 222 at 233.

[74] He declared the state "can require local improvements to be made which are essential to the health and prosperity of any community within its borders." Hagar v. Reclamation Dist. No. 108, 111 U. S. (1884) 701 at 704, 28 L. ed. 569. The principal point in this case, however, was the question of procedure. See also Wurts v. Hoagland, 114 U. S. (1885) 606, 29 L. ed. 229; State v. Hanson, 80 Nebr. (1908) 738, 117 N. W. 412; Mason City &c. R. Co. v. Wright County, 144 Iowa (1909) 10, 121 N. W. 39; Billings Sugar Co. v. Fish, 40 Mont. (1910) 256, 106 Pac. 565, 26 L. R. A. (N. S.) 973, 20 Ann. Cas. 264; Northern Pac. R. Co. v. Richland County,

It is evident that the court will go into the question of the purpose of the improvement, but it is also evident that they are very lenient on any questions involving the public health.[75] Indeed, if no proof is offered, the courts will assume that drainage projects benefit the health of the community,[76] and one justice has gone so far as to declare that the legislative declaration in this regard is conclusive.[77] It can hardly be said that this represents the view of the courts generally, for should a case arise in which no question of public health were presented, it may well be doubted if the courts would accept the legislative declaration in face of the actual facts. Such a case seems never to have presented itself.

§ 175. The tendency of the courts to assume a public purpose is very evident in the cases involving the validity of assessments for levees. No case has been presented to the courts which required a direct statement on this point. Although no question of public health is directly involved in cases of this type, most of them could be upheld on grounds of public safety.[78] It must be recognized,

28 N. Dak. (1914) 172, 148 N. W. 545, L. R. A. 1915A, 129, Ann. Cas. 1916E, 574; Less Land Co. v. Fender, 119 Ark. (1915) 20, 173 S. W. 407; Williams v. Wedding, 165 Ky. (1915) 361, 176 S. W. 1176; Miami County v. Dayton, 92 Ohio St. (1915) 215, 110 N. E. 726; Strawberry Hill Land Corp. v. Starbuck, 124 Va. (1918) 71, 97 S. E. 362; Hunter v. Owens, 80 Fla. (1920) 812, 86 So. 839; In re East Bottoms Drain. & L. Dist., 305 Mo. (1924) 577, 259 S. W. 89.

[75] A city may even go into the real estate business if it is necessary to drain a swamp and so promote the public health. Sweet v. Rechel, 159 U. S. (1895) 380, 40 L. ed. 188; New Orleans v. McDonough, 2 Rob. (La., 1842) 244.

[76] "As the drainage act is constitutional, because a valid exercise of the police power, and as the exercise of that power in itself implies that the purpose for which an assessment is directed is for the public good, the purpose is necessarily a public one." Zigler v. Menges, 121 Ind. (1889) 99 at 104. See also Duke v. O'Bryan, 100 Ky. (1897) 710, 39 S. W. 444; Hoertz v. Jefferson Southern Pond Drain. Co., 119 Ky. (1905) 824, 84 S. W. 114.

[77] Justice Whitfield in Hunter v. Owens, 80 Fla. (1920) 812, 86 So. 839.

[78] This was suggested in Soens v. Racine, 10 Wis. (1860) 271; Morrison v. Morey, 146 Mo. (1898) 543, 48 S. W. 629. In the second case the court took judicial notice of the fact that floods were injurious to health. See also: Donnelly v. Longport, 88 N. J. L. (1915) 68, 95 Atl. 740; Des Moines &c. Dist. v. Chicago, B. &c. R. Co., 240 Mo. (1912) 614, 145 S. W. 35.

On the validity of projects to regulate the flow of rivers see: Manchester v. Board of Water Commrs., 241 U. S. (1916) 649, 60 L. ed. 1221,

however, that their prime purpose is almost always to reclaim agricultural lands. The real reasons for the leniency of the courts in this class of cases are probably to be found in the peculiar nature of the lands reclaimed and the obvious necessity that it be done in co-operation if it be done at all.[79] Furthermore, natural streams have always been considered peculiarly under the control of the state and regulations affecting them are assumed to be for the public benefit.[80] In none of these cases, however, has the court gone into the question of public purpose for the assessment, although the power to provide levees is very wide in scope.[81]

affirming 87 Conn. (1913) 193, 87 Atl. 870, Ann. Cas. 1915A, 1105; Board of Black River Regulating Dist. v. Ogsbury, 203 App. Div. (1922) 43, 196 N. Y. S. 281.

The construction of a sea-wall is a public purpose for similar reasons. Sick v. Bay St. Louis, 113 Miss. (1917) 175, 74 So. 272.

[79] No court has held the purpose of these acts invalid. Williams v. Cammack, 27 Miss. (1854) 209, 61 Am. Dec. 508; Egyptian Levee Co. v. Hardin, 27 Mo. (1858) 495, 72 Am. Dec. 276; Columbia Levee Co. v. Meier, 39 Mo. (1866) 53; Daily v. Swope, 47 Miss. (1872) 367; Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. (1896) 151, 36 S. W. 1041; Hansen v. Hammer, 15 Wash. (1896) 315, 46 Pac. 332; Mound City Land &c. Co. v. Miller, 170 Mo. (1902) 240, 70 S. W. 721; State ex rel. v. Wall, 153 Mo. (1899) 216, 54 S. W. 465. Louisiana acting under the civil law has an entirely different basis for their levee acts. See: DuBose v. Levee Commrs., 11 La. Ann. (1856) 165; State v. Cage, 34 La. Ann. (1882) 506; Excelsior Plant. & Mfg. Co. v. Green, 39 La. Ann. (1887) 455, 1 So. 873; Peart v. Meeker, 45 La. Ann. (1893) 421, 12 So. 490; Eldridge v. Trezevant, 160 U. S. (1896) 452, 40 L. ed. 490.

Where these acts have been held unconstitutional it has always been because of the inequality of the assessment or the arbitrariness of the procedure, rather than because the purpose was not public. Moulton v. Parks, 64 Cal. (1883) 166, 30 Pac. 613; Davis v. Gaines, 48 Ark. (1886) 370, 3 S. W. 184; Brandenstein v. Hoke, 101 Cal. (1894) 131, 35 Pac. 562.

[80] Lewis, Eminent Domain (3rd ed.), sec. 306.

[81] Eminent domain may also be used to build a levee. Missouri, K. &c. R. Co. v. Cambern, 66 Kans. (1903) 365, 71 Pac. 809; State ex rel. v. Bates, 235 Mo. (1911) 262, 138 S. W. 482; Des Moines &c. Dist. v. Chicago, B. &c. R. Co., 240 Mo. (1912) 614, 145 S. W. 35, 39 L. R. A. (N. S.) 543; Foster v. Cowlitz County, 100 Wash. (1918) 502, 171 Pac. 539.

A recent Iowa case goes further than the earlier levee cases in that the prevention of erosion of agricultural lands is declared a public purpose for which eminent domain may be exerted. The court, however, relies on the necessity for the co-operative construction of retards if anything is to be done, as well as the dangers to public health and safety in the unimproved character of the stream. Kroon v. Jones, 198 Iowa (1925) 1270, 201 N. W. 8.

§ 176. The relation of co-operative improvement to the increase of economic productiveness of agricultural lands appears most clearly in the line of cases involving the creation of irrigation districts.[82] Here no questions of public health or safety could possibly be raised. This type of cases is, therefore, much closer to the borderline between a private and a public use of the power of taxation and eminent domain, than any of the other cases mentioned heretofore. Due process of law becomes most potent in the twilight zone between the reasonable and the arbitrary, and it is not to be wondered that its most extensive development, in regard to the purpose for which assessments may be laid, occurred here.

The most important act of this nature was passed in California and for one cause or another it was before the courts for more than a decade. The state Supreme Court upheld the law[83] on the ground that it would bring a large acreage under cultivation and so would tend to promote prosperity. Still more important, private enterprise had

[82] Supplying water to a city is of course a public purpose. Long Island Water Supply Co. v. Brooklyn, 166 U. S. (1897) 685, 41 L. ed. 1165; Manchester v. Board of Water Commrs., 241 U. S. (1916) 649, 60 L. ed. 1221; Lumbard v. Stearns, 4 Cush. (58 Mass., 1849) 60; Chicago v. Smith, 204 Ill. (1903) 356, 68 N. E. 395; Minnesota Canal & P. Co. v. Pratt, 101 Minn. (1907) 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105; Rome v. Whitestown Waterworks Co., 187 N. Y. (1907) 542, 80 N. E. 1106; Mundy v. Fountain, 76 N. J. L. (1908) 701, 71 Atl. 693; Miller v. Pulaski, 109 Va. (1909) 137, 63 S. E. 880, 22 L. R. A. (N. S.) 552; State ex rel. v. Superior Court, 51 Wash. (1909) 386, 99 Pac. 3; Lyons v. Longmont, 54 Colo. (1913) 112, 129 Pac. 198; Jeter v. Vinton-Roanoke Water Co., 114 Va. (1913) 769, 76 S. E. 921, Ann. Cas. 1914C, 1029; St. Louis v. Glasgow, 254 Mo. (1914) 262, 162 S. W. 596; Raystown Water Power Co. v. Brumbaugh, 246 Pa. (1914) 225, 92 Atl. 140; Bowden v. York Shore Water Co., 114 Maine (1915) 150, 95 Atl. 779; Paterson v. Kearny, 87 N. J. L. (1915) 327, 93 Atl. 1086; Wallace v. Winfield, 98 Kans. (1916) 651, 159 Pac. 11; Evel v. Utica, 103 Kans. (1918) 567, 175 Pac. 635; Raton v. Raton Ice Co., 26 N. Mex. (1921) 300, 191 Pac. 516; Langdon v. Walla Walla, 112 Wash. (1921) 446, 193 Pac. 1; Emerich v. Bourland, 156 Ark. (1922) 495, 246 S. W. 872; Matlock v. Bloomington Water Co., 146 N. E. (Ind., 1925) 852; Bogert v. Hackensack Water Co., 127 Atl. (N. J., 1925) 261.

[83] Lux v. Haggin, 69 Cal. (1886) 255, 4 Pac. 919, 10 Pac. 674; Turlock Irr. Dist. v. Williams, 76 Cal. (1888) 360, 18 Pac. 379; Central Irr. Dist. v. DeLappe, 79 Cal. (1889) 351, 21 Pac. 825; Crall v. Poso Irr. Dist., 87 Cal. (1890) 140, 26 Pac. 797; Board of Directors of Modesto Irr. Dist. v. Tregea, 88 Cal. (1891) 334, 26 Pac. 237; In re Madera Irr. Dist., 92 Cal. (1891) 296, 28 Pac. 272.

not, and could not, provide an adequate water supply, for a single landowner would meet insuperable obstacles quite apart from the question of using the power of eminent domain for such a purpose.[84] In the leading opinion of this series there was no mention of due process of law although the editor of the California reports classified it under that protection in the headnote.[85] This is rather significant in view of the fact that both questions of procedure and questions of benefits were raised, and when the law came before the Federal Circuit Court it was declared void because of a denial of this protection.[86] It was pointed out that only a small portion of the public would be directly benefited, and that compulsory benefits to individual landowners could only be sustained if the public was also benefited thereby. Even if a fairly large district were improved, the assessment could not be sustained if the public as a whole did not reap an advantage.[87]

This decision was appealed to the United States Supreme Court, but before it could be decided a similar law was upheld by the Supreme Court of Nebraska on the ground that due process referred primarily to the remedy provided in the act and not to the substantive acts in-

[84] The Constitution of California, 1879, declared: "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner to be prescribed by law." Article XIV, sec. I. It was fifteen years later when the power of eminent domain for irrigation ditches came before the United States Supreme Court. Clark v. Nash, 198 U. S. (1905) 361, 49 L. ed. 1085.

[85] In re Madera Irr. Dist., 92 Cal. (1891) 296, 28 Pac. 272. Justice Harrison declared: "Whatever tends to an increased prosperity of one portion of the state, or to promote its material development, is for the advantage of the entire state; and the right of the legislature to make provision for developing the productive capacity of the state, or for increasing facilities for the cultivation of its soil according to the requirements of the different portions thereof, is upheld by its power to act for the benefit of the people in affording them the right of 'acquiring, possessing, and protecting the property' which is guaranteed to them by the constitution." Page 313.

[86] Bradley v. Fallbrook Irr. Dist., 68 Fed. (1895) 948.

[87] "It is manifest, however, that the character of the use is not to be tested by the mere number of persons who may enjoy it. No man's property can be constitutionally taken from him without his consent, and transferred to certain other men for their own use, however numerous they may be." Bradley v. Fallbrook Irr. Dist., 68 Fed. (1895) 948 at 957.

volved.[88] With this conflict between the decisions of the state and the lower federal courts, the case assumed unusual importance before the United States Supreme Court. The opposition to the law was ably presented by Mr. Joseph H. Choate, who contended that any public benefit which the public might receive from the project was purely incidental. Consequently, there was really a taking of the property of one person for the benefit of other individuals and so due process of law was violated.[89]

Although the court, speaking through Justice Peckham, rejected his reasoning in this particular case, it is evident that the clearness of his thought made a profound impression on the judges. The court was compelled to discard the fetish of public health and placed the decision squarely upon the ground that special assessments could be used to further co-operative enterprises. If it were not held that irrigation were a public purpose, it was evident that it would be practically impossible for anyone to irrigate his land. The power of eminent domain could not be used to aid him, and one man who refused to co-operate in an irrigation project could block a

[88] "The conclusions we reach from an examination of the foregoing authorities are, first, that the term 'due process of law' relates primarily to the remedy or means of redress where property rights are invaded rather than to matters of substantive law, and that the provision of our statute for a hearing, upon notice, of all questions pertaining to the organization of irrigation districts and the imposition by them of taxes and assessments fully satisfies the requirements of the state and federal constitutions; second, the end and purpose of said act is, in a constitutional sense, public, and therefore, resting in the wisdom and discretion of the legislature. The reasoning, based upon the decision in Bradley v. Fallbrook Irr. Dist., [68 Fed. (1895) 948], must accordingly be rejected." Alfalfa Irr. Dist. v. Collins, 46 Nebr. (1895) 411 at 424, 64 N. W. 1086, per Justice Post. See also Lincoln &c. Irr. Dist. v. McNeal, 60 Nebr. (1900) 613, 83 N. W. 847; Cummings v. Hyatt, 54 Nebr. (1898) 35, 74 N. W. 411.

[89] "The immemorial and universally recognized right of every man to occupy and use his own land for such purposes as he sees fit, provided only that the land itself, or the condition in which he puts it, or the use he makes of it, does not injure his neighbor, in which indeed the essential right of private property consists, can not be invaded by his neighbor or by the state for the private benefit of his neighbor, for that is the very thing in which the taking of his property without due process of law consists." Mr. Choate in Fallbrook Irr. Dist. v. Bradley, 164 U. S. (1896) 112 at 138, 41 L. ed. 369.

whole community. While it may be questioned if a man may be forced to make his own land productive if that is the only consideration involved, it is an entirely different question when he obstructs the progress of the community. The problem becomes one of adjusting disputes between interests of conflicting individuals, and it can hardly be doubted that the state has that power. Furthermore, in this case, as was true in the drainage cases, the project could hardly be completed without benefiting all the land in the community regardless of the attitude of the owner.[90]

§ 177. This case has caused considerable confusion due to the fact that the court also threw out the suggestion that the creation of additional economic values might be a public purpose. Although the case can be completely supported on the simple ground that the legislature was merely settling the conflicting rights of individuals,[91] the impression was conveyed that the increase in economic productivity alone would have justified it.[92] To correct this impression, Justice Peckham, in a case involving the

[90] "The use must be regarded as a public use, or else it would seem to follow that no general scheme of irrigation can be formed or carried into effect. In general, the water to be used must be carried for some distance, and over or through private property, which can not be taken *in invitium* if the use to which it is to be put be not public; and, if there be no power to take property by condemnation, it may be impossible to acquire it at all. The use for which private property is to be taken must be a public one, whether the taking be by the exercise of the right of eminent domain or by that of taxation. Cole v. LaGrange, 113 U. S. (1885) 1, 28 L. ed. 896. A private company or corporation, without the power to acquire the land *in invitium*, would be of no real benefit; and, at any rate, the cost of the undertaking would be so greatly enhanced by the knowledge that the land must be acquired by purchase that it would be practically impossible to build the works or obtain the water. Individual enterprise would be equally ineffectual; no one owner would find it possible to construct and maintain waterworks and canals." Per Justice Peckham, Fallbrook Irr. Dist. v. Bradley, 164 U. S. (1896) 112 at 161, 41 L. ed. 369.

[91] In Walls v. Midland Carbon Co., 254 U. S. (1920) 300, 65 L. ed. 276, a police power regulation protecting natural resources was sustained on the basis that it was necessary to protect joint rights of parties involved. See also Ohio Oil Co. v. Indiana, 177 U. S. (1900) 190, 44 L. ed. 729; Lindsley v. National Carbonic Gas Co., 220 U. S. (1911) 61, 55 L. ed. 369.

[92] See Ellinghouse v. Taylor, 19 Mont. (1897) 462, 48 Pac. 757; State ex rel. v. Clausen, 110 Wash. (1920) 525, 188 Pac. 538.

use of the power of eminent domain to promote irrigation, took special care to point out that the decision did not rest on that ground.[93] Here again the central point of the case involved the power of the legislature to settle conflicting private rights as to communication and access,[94] and the fact that the water was to be used to develop natural resources was an incidental point which further substantiated the view of the court that eminent domain had been used for a public purpose.[95]

[93] "But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the state. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained." Clark v. Nash, 198 U. S. (1905) 361 at 369, 370, 49 L. ed. 1085. See also Prescott Irr. Co. v. Flathers, 20 Wash. (1899) 454, 55 Pac. 635.

[94] A different view of the case is taken by J. R. Commons, Legal Foundations of Capitalism (N. Y., 1924) pp. 328-331. He declared, "The officers of government are limited by due process and equal protection, but, within those limits they may reproportion the national economy by a reclassification of persons for the purpose of assigning to them what is deemed a proper share in the expected burdens and benefits of the commonwealth. Due process of law thus signifies the classification of persons according to what is deemed their public value." Page 331. While this conclusion is true in so far as there are certain distinct elements of public purpose involved, the broad statement as given can hardly be said to be warranted by the cases.

[95] The use of the powers of the state to further irrigation projects has been sustained in a large number of subsequent cases: Bordon v. Trespalacios Rice &c. Co., 204 U. S. (1907) 667, 51 L. ed. 671; Miocene Ditch Co. v. Jacobsen, 146 Fed. (1906) 680; Burley v. United States, 179 Fed. (1910) 1; United States v. O'Neill, 198 Fed. (1912) 677; Eastern Oregon Land Co. v. Willow River Land &c. Co., 204 Fed. (1913) 516; Prescott Irr. Co. v. Flathers, 20 Wash. (1899) 454, 55 Pac. 635; Lake Koen Nav. R. &c. Co. v. Klein, 63 Kans. (1901) 484, 65 Pac. 684; Pioneer Irr. Dist. v. Bradley, 8 Idaho (1902) 310, 68 Pac. 295, 101 Am. St. 201; Anderson v. Grand Valley Irr. Dist., 35 Colo. (1906) 525, 85 Pac. 313; Helena Power T. Co. v. Spratt, 35 Mont. (1907) 108, 88 Pac. 773, 8 L. R. A. (N. S.) 567, 10 Ann. Cas. 1055; Portneuf Irr. Co. v. Budge, 16 Idaho (1909) 116, 100 Pac. 1046, 18 Ann. Cas. 674; State ex rel. v. Superior Court, 59 Wash. (1910) 621, 110 Pac. 429, 140 Am. St. 893; State ex rel. v. Green River Irr. Dist., 40 Utah (1911) 83, 119 Pac. 1039; San Joaquin &c. I. Co. v. Stevenson, 164 Cal. (1912) 221, 128 Pac. 924; State ex rel. v. Superior Court, 67 Wash. (1912) 556, 122 Pac. 19; Cotulla v. La Salle Water Stor. Co., 153 S. W. (Tex. Civ. App., 1913) 711; Idaho-Iowa Lateral & R. Co. v. Fisher, 27 Idaho (1915) 695, 151 Pac. 998; Young v. Dugger, 23 N.

§ 178. The threads of this whole line of development have been admirably brought together in the recent case involving the validity of the Florida statute authorizing co-operative clearing of land. Justice Clayton of the United States District Court in a learned and carefully written opinion, discussed elaborately the whole theory of co-operative assessment districts. He pointed out that because there was an increase in the value of agricultural lands it could not be assumed that that was a public purpose. Consequently, if the work which it is proposed to do by an assessment district could be as well accomplished by single individuals the mere fact that the land values would be increased would not save the act. In the drainage cases, questions of public health, the necessity of co-operative enterprise, and an increase in economic productivity were all involved; the levee cases differed only in that public safety replaced public health; and the irrigation cases brought out the fact that incidental benefits like those to public health or public safety were not necessary to the validity of the acts. In short, the real purpose in all of these acts was that of co-operative improvement with an incidental public advantage. Where the project requires co-operative effort and where private rights are injured whichever way the legislature acts or fails to act, questions of general benefit to the entire state become insignificant.[96] A very slight amount of such benefit will justify the law.

Mex. (1918) 613, 170 Pac. 61; State v. Clausen, 110 Wash. (1920) 525, 188 Pac. 538; State ex rel. v. Superior Court, 119 Wash. (1922) 406, 205 Pac. 1051; In re Auxiliary Eastern Canal Irr. Dist., 24 Ariz. (1922) 163, 207 Pac. 614; Smith v. Cameron, 106 Ore. (1922) 1, 210 Pac. 716; State ex rel. v. Superior Court, 130 Wash. (1924) 661, 228 Pac. 695.

The only exception has been when the project can only benefit a single individual: Vetter v. Broadhurst, 100 Nebr. (1916) 356, 160 N. W. 109; Gravelly Ford Canal Co. v. Pope & T. L. Co., 178 Pac. (Cal. App., 1919) 150; Berg v. Twin Falls Canal Co., 36 Idaho (1923) 62, 213 Pac. 694. *Contra:* Sterritt v. Young, 14 Wyo. (1905) 146, 82 Pac. 946, 4 L. R. A. (N. S.) 169, 116 Am. St. 994; White v. Stout, 72 Wash. (1913) 62, 129 Pac. 917.

[96] The joint fence laws are extreme example of this rule. McKeever v. Jenks, 59 Iowa (1882) 300, 13 N. W. 295; Gilson v. Munson, 114 Mich. (1897) 671, 72 N. W. 994; Tomlinson v. Bainaka, 163 Ind. (1904) 112, 70

The case before the court, however, involved an improvement in which the necessity of co-operation was totally lacking. The law authorized a clearing company to pull the stumps on certain land and to assess the costs against the property proportionately to the acreage cleared. As the court pointed out, stump clearing could be as well undertaken by a single individual as by a group and unless economic productivity can itself be considered a public purpose, the law could not be upheld. There being no co-operative element in the case, it could only be justified by a great public purpose. Since economic benefit could not be so considered, the law was held to violate the due process.[97]

N. E. 155; Hill v. Tohill, 225 Ill. (1907) 384, 80 N. E. 253; Vincent v. Ackerman, 155 Mich. (1909) 614, 119 N. W. 1085; Collins v. Wilber, 173 Ind. (1909) 361, 89 N. E. 372. Such a law was declared void if there is no joint benefit from the fence. Alma Coal Co. v. Cozad, 79 Ohio St. (1908) 348, 87 N. E. 172.

[97] St. Paul Tr. & Sav. Bank v. American Clearing Co., 291 Fed. (1923) 212. The court pointed out that what might require a co-operative assessment in one district might be done by a single individual. Much would depend upon the particular circumstances. In the case of pulling stumps, however, it is difficult to see how any circumstance could arise in which co-operation would be essential.

CHAPTER XXII.

PUBLIC PURPOSE AND BUSINESS ENTERPRISE.

§ 179. If the concept of public purpose has any value as a legislative norm, it is evident that an act which takes the property of one individual and arbitrarily transfers it to another must be void. This, of course, is an extreme illustration, but it is the one which served to link due process of law with the concept of public purpose in taxation and eminent domain cases.[1] This is perhaps most clearly brought out in the cases which involve the relation of the government to business enterprise.

The fundamental concept in all the cases involving business as related to the purposes of government is that of the "public utility." In its widest sense every business has a public aspect. It is both a "public utility" and a "public disutility." To attempt a differentiation of businesses on some basis of physical characteristics is bound to be futile.[2] The only feasible judicial distinction between types of businesses lies in their historical development or their legal liabilities. Certain types of business stand in a peculiar legal relation to the government and the public at large, and consequently, may be considered as semi-public in their nature. At the same time, they are privately operated, and the profits from the enterprise go

[1] See Sharpless v. Philadelphia, 21 Pa. (1853) 147; Johnson v. Stark, 24 Ill. (1860) 75; Sweet v. Hulbert, 51 Barb. (N. Y., 1868) 312; Hanson v. Vernon, 27 Iowa (1869) 28; People v. State Treasurer, 23 Mich. (1871) 499; In re Opinion of the Justices, 58 Maine (1871) 590; Missouri Pac. R. Co. v. Nebraska, 164 U. S. (1896) 403, 41 L. ed. 489; Dodge v. Mission Tp. 107 Fed. (1901) 827.

[2] J. R. Commons Legal Foundations of Capitalism (N. Y., 1924), pp. 327, 328. See also Jones v. North Georgia E. Co., 125 Ga. (1905) 618 at 627, 54 S. E. 85.

into the pockets of the shareholders. Any aid to these corporations, therefore, is really an aid to the stockholders, and in effect it is merely a transfer of the property of one set of individuals (the taxpayers or those expropriated by the power of eminent domain) to another set (the stockholders).

Any justification of the use of the powers of the government in aid of private business must rest on the assumption that there is a "public purpose" to be served. If this purpose is made to depend upon the benefit which the community will derive from the enterprise, the line between a valid and an invalid purpose is extremely shadowy. The public is benefited by all industries to a certain degree and the constitutionality of legislation aiding especially chosen industries must then turn upon the amount of benefit. But the legislature has particular facilities for determining the amount of benefit, whereas the courts could only give an arbitrary opinion. There would be no good reason, therefore, why the matter of public benefit should not be left entirely to the legislative discretion.[3] Whenever possible, the court will try to evade a constitutional norm of such an indefinite character.[4]

Some enterprises, however, are peculiarly public in their legal characteristics.[5] In the first place, many of them are engaged in the performance of functions which have traditionally been associated with the exercise of govern-

[3] Note the statement of the Kansas court in this regard. "As to what is such a public benefit that it may be aided by the public, seems to be a question of public policy—of political economy, which must almost exclusively be determined by the legislature." Leavenworth County v. Miller, 7 Kans. (1871) 479 at 539, 540, 12 Am. Rep. 425.

[4] The doctrine of "public benefit" as a justification for the exercise of these powers has been definitely repudiated by a number of the courts. Jones v. North Georgia Elec. Co., 125 Ga. (1906) 618, 54 S. E. 85; State ex rel. v. Superior Court, 42 Wash. (1906) 660, 85 Pac. 666; Inspiration Consol. Cop. Co. v. New Keystone Cop. Co., 16 Ariz. (1914) 257, 144 Pac. 277; Smith v. Cameron, 106 Ore. (1922) 1, 210 Pac. 716. See also John Lewis, Treatise on the Law of Eminent Domain in the United States (Chicago, 1909) Vol. I, sec. 257. Contrast, however, the reasoning in Minneapolis v. Janney, 86 Minn. (1902) 111, 90 N. W. 312; In re Manchester, 87 Conn. (1913) 193, 87 Atl. 870, Ann. Cas. 1915A, 1105.

[5] See T. J. Michie, Treatise on the Law of Carriers (Charlottesville, 1915), Vol. I, sec. 1.

mental power. For example, the railroads, in so far as they aid in public communication, may be considered as supplementary to the road system. But the functions which the government performs are by their very nature open to all alike and if we are to set off some enterprises as public because they aid in the performance of governmental objects, it is obvious that the enterprise must be "public"; that is open to everyone. Consequently, one of the principle tests of a public business is whether it is open to the public to the limit of its capacity. Closely connected with this rule is another which also grew out of the common law. A public carrier must operate on an established route, and consequently has, in many respects, a natural monopoly. Therefore, while it is not necessary that a business have an absolute monopoly to be considered a public in its function, it must have certain features in common with monopolistic enterprises.

A second group of characteristics of public utilities, center around the fact that they make a charge for their services. In this respect they differ from many public enterprises which are eleemosynary in character. But in consideration of the special position which they occupy as public utilities, and because they are permitted to charge a public toll for their services, the courts hold them to a special liability for damages. Furthermore, they automatically come under the power of the state in such matters as rate regulation. The public character of these enterprises, therefore, grows out of a *quid pro quo* in which certain powers of the state are exchanged for more stringent regulatory privileges than the government enjoys over purely private business.[6]

Historically, the power of eminent domain was given these corporations before there was any concerted attempt to aid them by means of the taxing power. In fact, one of the reasons which was urged to justify the loan of public credit to railroads, was that they were public enterprises

[6] Georgia R. & Bank. Co. v. Smith, 128 U. S. (1888) 174, 32 L. ed. 377.

because they had the power of eminent domain. Logically, however, it would seem that what is a public purpose for one power of government should be also public in another, inasmuch as the publicity of the enterprise depends upon the legal privileges and obligations which have been given it.

§ 180. The use of the power of eminent domain in aid of public service corporations did not become important before the development of railroads as a means of transportation. The power had frequently been used in aid of privately controlled turnpikes, bridges, ferries and canals, and its constitutionality was generally taken for granted. In a few cases it was contended that the power could not be used for enterprises of this nature, but the contention was uniformly rejected by the courts.[7] There was at first great popular prejudice against the steam railroads and consequently the cases involving grants of public powers to them were more stubbornly fought. It was in this connection that due process of law first became an important factor in eminent domain cases.

In 1831 the New York courts were presented with the question of the validity of expropriations for railroad pur-

[7] *Turnpikes:* M'Clenachan v. Curwen, 6 Bin. (Pa., 1802) 509, 3 Yeates 362; Backus v. Lebanon, 11 N. H. (1840) 19, 35 Am. Dec. 466; Justices, etc., Pike County v. Griffin &c. Pl. Rd. Co., 9 Ga. (1851) 475; State v. Maine, 27 Conn. (1858) 641, 71 Am. Dec. 89; Mountain Retreat Assn. v. Mt. Mitchell Dev. Co., 183 N. Car. (1922) 43, 110 S. E. 524.

Bridges: West River Bridge Co. v. Dix, 6 How. (U. S., 1848) 507, 12 L. ed. 535; Luxton v. North River Bridge Co., 153 U. S. (1894) 525, 38 L. ed. 808; Young v. Buckingham, 5 Ohio (1832) 485; Arnold v. Covington & C. Bridge Co., 1 Duval (Ky., 1864) 372; Plecker v. Rhodes, 30 Grat. (Va., 1878) 795; Southern Illinois & M. Bridge Co. v. Stone, 174 Mo. (1903) 1, 73 S. W. 453, 63 L. R. A. 301. Of course, a toll bridge may be secured by the government by having its property condemned. Rumford & Mexico Bridge Dist. v. Mexico Bridge Co., 115 Maine (1916) 154, 98 Atl. 625.

Ferries: Pool v. Simmons, 134 Cal. (1901) 621, 66 Pac. 872; Southern Illinois & M. Bridge Co. v. Stone, 174 Mo. (1903) 1, 73 S. W. 453, 63 L. R. A. 301.

Canals: Chesapeake & O. Canal Co. v. Key, 3 Cranch (U. S., 1829) 599, Fed. Cas. No. 2649; Waterloo W. Mfg. Co. v. Shanahan, 128 N. Y. (1891) 345 at 358, 28 N. E. 358; Alexander v. City Council of Augusta, 134 Ga. (1910) 849, 68 S. E. 704; Essex Co. v. Commonwealth, 246 Mass. (1923) 242, 141 N. E. 38.

poses. The chancellor pointed out that a common carrier had a peculiar public function and thus could be given special advantages.[8] Four years later the United States Circuit Court upheld an exercise of eminent domain by railroad corporations, but in neither of these early cases was the question of due process of law raised.[9] This question was brought up in a very important New York case which was decided in 1837.[10]. The judges recognized the importance of the "law of the land" as a restriction upon the power of eminent domain, but they pointed out that a railroad was a public carrier and therefore might have certain privileges which must be denied to others.[11]

It is evident that there was an attempt to gloss over the real issues involved in these early cases and to assume that a railroad was in itself devoted to a public use. The Pennsylvania court even went so far as to declare that it made no difference if the road were open to the public or not.[12] This view was exceptional, however, and it soon

[8] "The public have an interest in the use of the railroad, and the owners may be prosecuted for the damages sustained, if they should refuse to transport an individual, or his property, without any reasonable excuse upon being paid the usual rate of fare. The legislature may also, from time to time, regulate the use of the franchise and limit the amount of toll which it shall be lawful to take in the same manner as they may regulate the amount of tolls to be taken at a ferry, or for grinding at a mill, unless they have deprived themselves of that power by a legislative contract with the owners of the road." Beekman v. Saratoga & Schenectady R., 3 Paige (N. Y., 1831) 45 at 75.

[9] Baltimore & O. R. Co. v. Van Ness, 4 Cranch (U. S., 1835) 595; Fed. Cas. No. 830. In this case the state of Maryland was to get a share of the profits of the railroad.

[10] Bloodgood v. Mohawk &c. R. Co., 18 Wend. (N. Y., 1837) 9, 31 Am. Dec. 313.

[11] Due process means that "the enjoyment of private property should always be held sacred and inviolable, except in urgent pressing necessity in regard to public health, public defense, or public uses." Bloodgood v. Mohawk &c. R. Co., 18 Wend. (N. Y., 1837) 9, 31 Am. Dec. 313.

[12] C. J. Gibson declared, "If there is an appearance of solidity in any part of the argument, it is that the legislature have not power to authorize an application of another's property to a private purpose even on compensation made, because there is no express constitutional affirmance of such a power. But who can point out an express constitutional disaffirmance of it? The clause by which it is declared that no man's property shall be taken, or applied to public use without the consent of his representatives, and without just compensation made, is a disabling, not an enabling one; and the right would have existed in full force without it. . . . It seems

became settled that railroads were a public utility and consequently could be given the power of eminent domain.[13] But the courts were very slow to realize the importance of due process as a limitation upon abuses of this power. In 1845 the New Hampshire court rendered one of the leading decisions on the question of giving railroads the power of eminent domain, but declared that there was no specific prohibition in the constitution against arbitrary exercises of this power. If there was any protection it was in the general spirit of the fundamental law.[14] Seven years later

clear that there is nothing in the constitution to prevent it; and the practice of the legislature has been in accordance with the principle, of which the application of another's ground to the purpose of a private way, is a pregnant proof . . . As in the case of the statute for compromising the dispute with the Connecticut claimants, under which the property of one man was taken from him and given to another, for the sake of peace, the end to be attained by this lateral railroad law is the public prosperity." Harvey v. Thomas, 10 Watts (Pa., 1840) 63 at 66, 67, 36 Am. Dec. 141.

[13] On the general power of railroads to use eminent domain see: Walther v. Warner, 25 Mo. (1857) 277; Bridal Veil Lumbering Co. v. Johnson, 30 Ore. (1896) 205, 46 Pac. 790, 34 L. R. A. 368, 60 Am. St. 818; Caretta R. Co. v. Virginia-Pocahontas Coal Co., 62 W. Va. (1907) 185, 57 S. E. 401; Gauley & S. R. Co. v. Vencill, 73 W. Va. (1914) 650, 80 S. E. 1103; Porter v. International Bridge Co., 200 N. Y. (1910) 234, 93 N. E. 716, 21 Ann. Cas. 684; State v. Superior Court, 62 Wash. (1911) 612, 114 Pac. 444; State v. Superior Court, 68 Wash. (1912) 572, 123 Pac. 996, 40 L. R. A. (N. S.) 793; Chicago, B. &c. R. Co. v. McCooey, 273 Mo. (1918) 29, 200 S. W. 59; Howard Realty Co. v. Paducah & I. R. Co., 182 Ky. (1919) 494, 206 S. W. 774; State ex rel. v. Thomas, 278 Mo. (1919) 85, 211 S. W. 667.

Rights of way may be condemned over other lines (Alabama &c. R. Co. v. Jackson &c. R. Co., 131 Miss. (1923) 857, 95 So. 733), or stock in other companies may be expropriated. New York, N. H. &c. R. Co. v. Offield, 77 Conn. (1904) 417, 59 Atl. 510; Landell v. State, 128 Atl. (N. J. S., 1925) 380.

Railroads devoted exclusively to either passenger or freight traffic may use this power. *Freight:* Ulmer v. Lime Rock R. Co., 98 Maine (1904) 579, 57 Atl. 1001, 63 L. R. A. 387; State v. Superior Court, 62 Wash. (1911) 612, 114 Pac. 444; Oswego, D. & R. Co. v. Cobb, 66 Ore. (1913) 587, 135 Pac. 181; State v. Superior Court, 83 Wash. (1915) 445, 145 Pac. 421. *Passenger:* Gillette v. Aurora R. Co., 228 Ill. (1907) 261, 81 N. E. 1005; Piedmont Cotton Mills v. Georgia R. & Elec. Co., 131 Ga. (1908) 129, 62 S. E. 52.

If the railroad is not a common carrier, however, it is unconstitutional to give it this power. Maginnis v. Knickerbocker Ice Co., 112 Wis. (1901) 385, 88 N. W. 300, 69 L. R. A. 833; Cozad v. Kanawha Hardw. Co., 139 N. Car. (1905) 283, 51 S. E. 932, 1 L. R. A. (N. S.) 969, 111 Am. St. 779; Hench v. Pritt, 62 W. Va. (1907) 270, 57 S. E. 808, 125 Am. St. 966; Gauley & S. R. Co. v. Vencill, 73 W. Va. (1914) 650, 80 S. E. 1103.

[14] "We have no doubt that a law providing merely that the property of

the Michigan court specifically stated that due process did not "prohibit the exercise of the right of eminent domain,"[15] and it was not until 1896 that the Supreme Court of the United States admitted that due process restricted the purposes for which property might be condemned.[16]

The importance of railroads in the economic development of the country was always a primary consideration in determining the constitutionality of giving them the power of expropriation. The need for more and better means of communication, the fact that a railroad was a public carrier with special liability, and the close relation between communication and the public welfare were controlling factors in the attitude of the court on this question. So impressed have the courts been with the importance of encouraging the development of improved methods of transportation, that they have upheld the use of the power of eminent domain for terminal facilities,[17] and

A should be taken from [him] and given to B either with or without a consideration, would be repugnant to the constitution. Not indeed to the letter of any particular clause contained in it, but to its spirit and design, which throughout the whole, discountenance the idea that the property of the citizen is held by any such uncertain tenure as the arbitrary discretion of the legislature in a matter of mere private right, unconnected with any considerations of public utility. Such a law would not be so much in repugnance to the constitution as it would be to the principles which hold human society together; which, while they recognize the power of the legislature to be supreme, do not admit it to be arbitrary." Justice Gilchrist, Concord R. v. Greely, 17 N. H. (1845) 47 at 55, 56.

[15] Justice Martin declared "This provision was evidently framed with a jealous eye to arbitrary executive power, and was not designed to restrict judicial or legislative authority, but rather to limit and confine the power over persons and property, to them. . . . No one will contend they prohibit the exercise of the right of eminent domain." Swan v. Williams, 2 Mich. (1852) 427 at 433.

[16] Fallbrook Irr. Dist. v. Bradley, 164 U. S. (1896) 113, 41 L. ed. 369; Missouri Pac. R. Co. v. Nebraska, 164 U. S. (1896) 403, 417, 41 L. ed. 489. The Missouri Pacific case was the first one in which a state eminent domain statute was declared void as being contrary to due process of law. The view of the court had been stated in the dissenting opinion of Justice Bradley in Davidson v. New Orleans, 96 U. S. (1877) 97 at 107, 24 L. ed. 616.

[17] Justice Beard declared, "The term 'public use' is a flexible one. It varied and expands with the growing needs of a more complex social order. Many improvements universally recognized as impressed with a public use were nonexistant a few years ago. The possibility of railroads was not dreamed of in a past not very remote, yet when they came the courts, recognizing the important part they were to perform in supplying a public

other necessary incidents of railroad operation,[18] and even

want, did not hesitate to take control of them as quasi-governmental agents and extend to them the right of eminent domain in order to equip them thoroughly to discharge the duties to the community which followed their grant of franchises. This is equally true as to other appliances which now form important parts of a rapidly widening system of social and commercial intercommunication. So it may be said at the present time that 'anything which will satisfy a reasonable public demand for public facilities for travel or for transmission of intelligence or commodities' (Stewart v. Great Northern R. Co., 65 Minn. (1896) 515, 68 N. W. 208, 33 L. R. A. 427), and of which the general public, under reasonable regulations, will have a definite and fixed use, independent of the will of the party in whom title is vested, would be a public use." Ryan v. Louisville &c. Term. Co., 102 Tenn. (1898) 111, at p. 118, 50 S. W. 744, 45 L. R. A. 303.

Other cases involving terminal companies are: Collier v. Union R. Co., 113 Tenn. (1904) 96, 83 S. W. 155; Riley v. Charleston Union S. Co., 71 S. Car. (1905) 457, 51 S. E. 485, 110 Am. St. 579.

Railroads may condemn lands for stations. Harlem River &c. R. Co. v. Arnow, 21 App. Div. (1897) 636, 47 N. Y. S. 438; Chicago &c. R. Co. v. Chicago Mechanics' Institute, 239 Ill. (1909) 197, 87 N. E. 933; Michigan Cent. R. Co. v. Miller, 172 Mich. (1912) 201, 137 N. W. 555. Electric lines and even express companies may be given the same power. Eddleman v. Union County Trac. & Power Co., 217 Ill. (1905) 409, 75 N. E. 510; Manhattan R. Co. v. Astor, 56 Misc. (1907) 353, 107 N. Y. S. 666; Eckart v. Ft. Wayne &c. Trac. Co., 181 Ind. (1914) 352, 104 N. E. 762; Rowland v. Mercer County Trac. Co., 90 N. J. L. (1918) 82, 102 Atl. 814.

So, too, land may be condemned to furnish freight facilities. Central Pac. R. Co. v. Feldman, 152 Cal. (1907) 303, 92 Pac. 849; Chicago, I. &c. R. Co. v. Baugh, 175 Ind. (1911) 419, 94 N. E. 571; Vallejo & N. R. Co. v. Reed Orchard Co., 169 Cal. (1915) 545, 147 Pac. 238; Simmons v. Northern Pac. R. Co., 147 Minn. (1920) 313, 180 N. W. 114 (potato elevator).

[18] *Construct side tracks:* Brown v. Chicago G. W. R. Co., 137 Mo. (1897) 529, 38 S. W. 1099; State v. Chicago, M. &c. R. Co., 115 Minn. (1911) 51, 131 N. W. 859; Pitznogle v. Western Md. R. Co., 119 Md. (1913) 673, 87 Atl. 917, 46 L. R. A. (N. S.) 319 (railroad yard); Harrold Bros. v. Americus, 142 Ga. (1914) 686, 83 S. E. 534; Ochs v. Chicago &c. R. Co., 135 Minn. (1916) 323, 160 N. W. 866.

Build reservoirs: Dillon v. Kansas City, Ft. S. &c. R. Co., 67 Kans. (1903) 687, 74 Pac. 251; Northern Pac. R. Co. v. Kreszeszewki, 17 N. Dak. (1908) 203, 115 N. W. 679; Wilson v. Pittsburgh &c. R. Co., 222 Pa. (1909) 541, 72 Atl. 235; Lea v. Louisville &c. R. Co., 135 Tenn. (1916) 560, 188 S. W. 215.

Topographical changes: State v. District Court, 34 Mont. (1906) 535, 88 Pac. 44, 115 Am. St. 540; Smith v. Cleveland, C. C. &c. R. Co., 170 Ind. (1907) 382, 81 N. E. 501; Spokane v. Thompson, 69 Wash. (1912) 650, 126 Pac. 47; Eikenberry v. St. Paul &c. R. Co., 174 Iowa (1916) 6, 156 N. W. 163.

Abolish grade crossings: Long Island R. Co. v. Sherwood, 205 N. Y. (1912) 1, 98 N. E. 169; Pitznogle v. Western Maryland R. Co., 119 Md. (1913) 673, 87 Atl. 917, 46 L. R. A. (N. S.) 319; Spokane v. Spokane &c. R. Co., 75 Wash. (1913) 651, 135 Pac. 636; Erie R. Co. v. Public Serv. Commn., 271 Pa. (1921) 409, 114 Atl. 357.

Other objects: Gardner v. Georgia R. &c. Co., 117 Ga. (1903) 522, 43 S. E. 863 (double track); Whitmeyer v. Salt Lake &c. R. Co., 46 Utah (1915) 491, 151 Pac. 48 (access to car barns).

for spurs for private plants.[19] When other means of communication have assumed important proportions, the courts have not hesitated to declare them public purposes on the same principles.[20] The decisions of the courts in

[19] Hairston v. Danville &c. R. Co., 208 U. S. (1908) 598, 52 L. ed. 637; Union Lime Co. v. Chicago &c. R. Co., 233 U. S. (1914) 211, 58 L. ed. 924; In re Minneapolis & St. L. R. Co., 76 Minn. (1899) 302, 79 N. W. 304; Chicago &c. R. Co. v. Morehouse, 112 Wis. (1901) 1, 87 N. W. 849, 56 L. R. A. 240, 88 Am. St. 918; Morrison v. Thistle Coal Co., 119 Iowa (1903) 705, 94 N. W. 507; Zircle v. Southern R. Co., 102 Va. (1903) 17, 45 S. E. 802, 102 Am. St. 805; New York Min. Co. v. Midland Min. Co., 99 Md. (1904) 506, 58 Atl. 217; Chesapeake Stone Co. v. Moreland, 126 Ky. (1907) 656, 31 Ky. L. 1075, 104 S. W. 762, 16 L. R. A. (N. S.) 479; Greasy Creek Min. Co. v. Ely Jellico Coal Co., 132 Ky. (1909) 692, 116 S. W. 1189; Dubuque &c. R. Co. v. Ft. Dodge, D. M. &c. R. Co., 146 Iowa (1910) 666, 125 N. W. 672; Dotson v. Atchison, T. &c. R. Co., 81 Kans. (1910) 816, 106 Pac. 1045; Ozark Coal Co. v. Pennsylvania Anthracite R. Co., 97 Ark. (1911) 495, 134 S. W. 634, Ann. Cas. 1912D, 1000; Westport Stone Co. v. Thomas, 175 Ind. (1911) 319, 94 N. E. 406, 35 L. R. A. (N. S.) 646; Riley v. Louisville, H. &c. R. Co., 142 Ky. (1911) 67, 133 S. W. 971, 35 L. R. A. (N. S.) 636, Ann. Cas. 1912D, 230; St. Louis, I. M. &c. R. Co. v. Ft. Smith &c. R. Co., 104 Ark. (1912) 344, 148 S. W. 531; Illinois Central R. Co. v. East Sioux Falls Q. Co., 33 S. Dak. (1913) 63, 144 N. W. 724; Bradley v. Lithonia &c. R. Co., 147 Ga. (1917) 22, 92 S. E. 539; Range Sand-Lime Brick Co. v. Great Northern R. Co., 137 Minn. (1917) 314, 163 N. W. 656; Southern Pac. R. Co. v. Los Angeles Mill Co., 177 Cal. (1918) 395, 170 Pac. 829; Menasha Woodenware Co. v. Railroad Commn., 167 Wis. (1918) 19, 166 N. W. 435; Pioneer Coal Co. v. Cherrytree & D. R. Co., 273 Pa. (1922) 43, 116 Atl. 45; West v. Whitehead, 238 S. W. (Tex. Civ. App., 1922) 976; Cottrell v. Chicago, T. H. &c. R. Co., 192 Ind. (1923) 692, 138 N. E. 504.

If, however, the spur is to be used solely for private purposes it is not part of a common carrier, some courts hold the power of eminent domain can not be used. Garbutt Lumber Co. v. Georgia & A. R., 111 Ga. (1900) 714, 36 S. E. 942; Mays v. Seaboard Air Line R., 75 S. Car. (1906) 455, 56 S. E. 30; Pere Marquette R. Co. v. United States Gypsum Co., 154 Mich. (1908) 290, 117 N. W. 733, 22 L. R. A. (N. S.) 181; George Sweet Mfg. Co. v. Van Der Hoof, 137 App. Div. (1910) 492, 121 N. Y. S. 842; In re Grade Crossing Commrs., 207 N. Y. (1912) 52, 100 N. E. 714, Ann. Cas. 1914C, 217; Baines v. Marshfield &c. R. Co., 62 Ore. (1912) 510, 124 Pac. 672; Atlanta, S. M. &c. R. Co. v. Bradley, 141 Ga. (1914) 740, 81 S. E. 1104; Litchfield &c. R. Co. v. Alton &c. R. R., 305 Ill. (1922) 388, 137 N. E. 248.

[20] *Pipe line:* West Virginia T. Co. v. Volcanic Oil &c. Co., 5 W. Va. (1872) 382; Rushville v. Rushville Nat. Gas Co., 132 Ind. (1892) 575, 28 N. E. 853, 15 L. R. A. 321; Charleston Nat. Gas Co. v. Low, 52 W. Va. (1901) 662, 44 S. E. 410; La Harpe v. Elm Tp. Gas, L. F. &c. Co., 69 Kans. (1904) 97, 76 Pac. 448; Calor Oil &c. Co. v. Franzell, 128 Ky. (1908) 715, 33 Ky. L. 98, 109 S. W. 328, 36 L. R. A. (N. S.) 456; Calor Oil & Gas Co. v. Withers' Admr., 141 Ky. (1911) 489, 133 S. W. 210; Carnegie Nat. Gas Co. v. Swiger, 72 W. Va. (1913) 557, 79 S. E. 3, 46 L. R. A. (N. S.) 1073; Pittsburgh & W. Va. Gas Co. v. Cutright, 83 W. Va. (1919) 42, 97 S. E. 686.

Telegraph: Pierce v. Drew, 136 Mass. (1883) 75, 49 Am. Rep. 7; Mobile &c. R. Co. v. Postal Tel. C. Co., 120 Ala. (1898) 21, 24 So. 408; Mobile & O. R. Co. v. Postal Tel. C. Co., 101 Tenn. (1898) 62, 46 S. W. 571, 41 L. R. A. 403; Union Pac. R. Co. v. Colorado Postal Tel. Cable Co., 30 Colo. (1902) 133, 69 Pac. 564, 97 Am. St. 106; New Union Tel. Co. v. Marsh, 96 App. Div. (1904) 122, 89 N. Y. S. 79; Western Union T. Co. v. Hill, 163 Ala. (1909) 18, 50 So. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058.

Telephone: Northwestern Tel. E. Co. v. Chicago M. &c. R. Co., 76 Minn. (1899) 334, 79 N. W. 315; American T. &c. Co. v. St. Louis &c. R. Co., 202 Mo. (1907) 656, 101 S. W. 576; Joliff v. Muncie Elec. L. Co., 181 Ind. (1914) 650, 105 N. E. 234; Mitchell v. Southern N. Eng. T. Co., 90 Conn. (1916) 179, 96 Atl. 966.

Navigation improvements: Kaukauna Water Power Co. v. Green Bay Co., 142 U. S. (1891) 254, 35 L. ed. 1004; United States v. Chandler-Dunbar Water Power Co., 229 U. S. (1913) 53, 57 L. ed. 1063; In re Condemnations for Imp. of Rouge River, 266 Fed. (1920) 105; Alabama Power Co. v. Gulf Power Co., 283 Fed. (1922) 606; Nelson v. Fleming, 56 Ind. (1877) 310; In re Southern Wis. Power Co., 140 Wis. (1909) 245, 122 N. W. 801; In re Bremerton, 73 Wash. (1913) 565, 132 Pac. 240; State v. Milwaukee, 156 Wis. (1914) 549, 146 N. W. 775; State ex rel. v. Superior Court, 102 Wash. (1918) 331, 173 Pac. 186; Marchant v. Baltimore, 146 Md. (1925) 513, 126 Atl. 884. But if docks are for private use only land may not be condemned. State ex rel. v. Wiethaupt, 231 Mo. (1910) 449, 133 S. W. 329.

Logging flumes: Maffet v. Quine, 93 Fed. (1899) 347; In re Burns, 155 N. Y. (1898) 23, 49 N. E. 246; State v. Superior Court, 47 Wash. (1907) 397, 92 Pac. 269. Except where not open to the public. Brewster v. Rogers Co., 169 N. Y. (1901) 73, 62 N. E. 164, 58 L. R. A. 495; Matthews v. Belfast Mfg. Co., 35 Wash. (1904) 662, 77 Pac. 1046.

Aerial Bucket Line: Highland Boy Gold M. Co. v. Strickley, 200 U. S. (1906) 527, 50 L. ed. 581.

Mining tunnel: Tanner v. Treasury Tunnel, M. & R. Co., 35 Colo. (1906) 593, 83 Pac. 464, 4 L. R. A. (N. S.) 106; Monetaire Min. Co. v. Columbus Rexall Consol. Mines Co., 53 Utah (1918) 413, 174 Pac. 172. *Contra:* if not open to public. Inspiration Consol. Copper Co. v. New Keystone Copper Co., 16 Ariz. (1914) 257, 144 Pac. 277.

Subway: In re Low, 233 N. Y. (1922) 334, 135 N. E. 521; Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. (1916) 100, 159 Pac. 992.

Electric power line: Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U. S. (1916) 30, 60 L. ed. 507; Palmer v. Larchmont Elec. Co., 158 N. Y. (1899) 231, 52 N. E. 1092; Southern Power Co. v. Walker, 89 S. Car. (1911) 84, 71 S. E. 356; Pittsburg Hydro-Elec. Co. v. Liston, 70 W. Va. (1911) 83, 73 S. E. 86, 40 L. R. A. (N. S.) 602; Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. (1916) 100, 159 Pac. 992; Public Serv. Co. v. Recktenwald, 290 Ill. (1919) 314, 125 N. E. 271; Webb v. Knox County Trans. Co., 143 Tenn. (1920) 423, 225 S. W. 1046; West Virginia & Md. P. Co. v. Racoon Valley Coal Co., 93 W. Va. (1923) 505, 117 S. E. 891; Elliott v. Wille, 112 Nebr. (1924) 78, 198 N. W. 861; Kulp v. Public Serv. Commn., 82 Pa. Super. Ct. (1924) 83; Brooke Elec. Co. v. Beall, 96 W. Va. (1924) 637, 123 S. E. 587; Smith v. Kentucky &c. P. Co., 207 Ky. (1925) 401, 269 S. W. 310; In re Milwaukee Elec. Ry. & L. Co., 203 N. W. (Wis., 1925) 912.

Electric burglar alarm: Holmes Elec. Protect. Co. v. Williams, 228 N. Y. (1920) 407, 127 N. E. 315.

this group of cases indicate that they are not controlled by any attempt to determine relative degrees of public benefit, but are rather applying settled constitutional principles to new conditions as they arise. Formal considerations or questions of public benefit are at most subsidiary to the principle question of public use.[21]

§ 181. A much more difficult problem is involved in the question of the use of the taxing power to aid public utilities. The power of eminent domain cannot be used without giving a just compensation for the property taken, but in the case of taxes the only return to the taxpayer is in the form of general benefits from the government. When, however, the money raised by taxation is turned over to a private industry, it is difficult to establish the fact of benefit to those who bear the burden. The only justification for taxes for this purpose must arise out of the peculiar public function of the enterprise aided.

Few cases have arisen involving the power to levy taxes to aid turnpike, canal, or bridge companies. It is evident, however, that in each of these cases a public service is performed and if the agencies are open to the public, the appropriations have been upheld.[22] But when the tax was levied to help build a road of a purely private nature which was not open to public use, the courts have declared

[21] This is clearly shown in In re Niagara Falls & W. R. Co., 108 N. Y. (1888) 375, 15 N. E. 429, where it was held that the power of eminent domain could not be used for a railroad which operated for pleasure purposes only. The fundamental reasoning underneath this decision is that such a road is not a general public utility. Compare this decision with Rindge Co. v. Los Angeles County, 262 U. S. (1923) 700, 67 L. ed. 1186.

The disregard of formal considerations is shown in the refusal of the court to sanction a railroad acquiring more than a mere right of way. Consequently they can not secure mining rights. Vermilya v. Chicago M. &c. R. Co., 66 Iowa (1885) 606, 24 N. W. 234; Nashville, C. &c. R. Co. v. Karthaus, 150 Ala. (1907) 633, 43 So. 791.

[22] *Turnpike:* Buncombe Tpk. Co. v. McCarson, 18 N. Car. (1835) 306; Commonwealth v. McWilliams, 11 Pa. (1849) 61; Mitchell v. Burlington, 4 Wall. (U. S., 1866) 270, 18 L. ed. 350; Pritchard v. Magoun, 109 Iowa (1899) 364, 367, 80 N. W. 512, 46 L. R. A. 381.

Canal: Goodin v. Crump, 8 Leigh (Va., 1837) 120; Thomas v. Leland, 24 Wend. (N. Y., 1840) 65; Taylor v. Newberne, 55 N. Car. (1855) 141, 64 Am. Dec. 566; Dronberger v. Reed, 11 Ind. (1858) 420.

Bridge: Shaw v. Dennis, 5 Gil. (Ill., 1849) 405.

that there was no public purpose and hence the tax was unconstitutional.[23]

A more important question arose, however, in connection with aid to railroads. The tremendous value of a railway line to a community due to the prosperity which frequently attended its opening, led counties, cities, and even states to encourage private companies to build them by a loan of public credit.

There was hardly a state in which the question of the validity of such loans was not raised, and in all over one hundred cases were brought to the courts involving this point during the first half century of railroad development. In many of these cases there was no question of due process of law brought up,[24] but they all show significantly the attitude of the courts toward questions of public purpose.

At first it would seem that no distinction could be drawn between aid to railroads and aid to turnpikes, and the early decisions tend to uphold the grants. The leading case of this period was Sharpless v. Mayor of Philadelphia,[25] in which a resident of the city brought suit for an injunction to prevent a municipal subscription to railroad stock. The court found that the cities of the state had issued over fourteen million dollars' worth of bonds for aid to railroads. The court was unwilling to declare these void on abstract notions of natural justice or because of indefinite provisions in the state constitution. The contention that

[23] Philbrook v. Kennebec, 17 Maine (1840) 196; Pacific Bridge Co. v. Kirkham, 54 Cal. (1880) 558; Snyder v. Foster, 77 Iowa (1889) 638, 42 N. W. 506; Manning v. Devil's Lake, 13 N. Dak. (1904) 47, 99 N. W. 51, 66 L. R. A. 187, 112 Am. St. 652.

[24] Bridgeport v. Housatonic R. Co., 15 Conn. (1843) 475. In this case the question involved the power of the legislature to retroactively ratify a loan by a town to a railroad. The court refused to declare this "opposed" to the true spirit of the constitution. Page 497. Due process was not considered in Nichol v. Nashville, 9 Humph. (Tenn., 1848) 252; Talbot v. Dent, 9 B. Mon. (Ky., 1849) 526; Slack v. Maysville & L. R. Co., 13 B. Mon. (Ky., 1852) 1; Cincinnati, W. & Z. R. Co. v. Clinton Co., 1 Ohio St. (1852) 77; Cass v. Dillon, 2 Ohio St. (1853) 607; Stein v. Mobile, 24 Ala. (1854) 591; Clarke v. Rochester, 13 How. Pr. (N. Y., 1856) 204, reversed 14 How. Pr. (N. Y., 1857) 193, 24 Barb. (N. Y., 1857) 446.

[25] 21 Pa. (1833) 147, 59 Am. Dec. 759.

there was a violation of due process was disposed of by the simple expedient of saying that it did not limit the power to levy taxes.[26]

The court did recognize that taxes must be levied for a public purpose, but it pointed out that a railroad differed from a purely private corporation in many respects, and consequently the state could build one itself or aid private individuals in building one. In the latter event the same result would be secured with less risk.[27] The reasoning in this case, with slight variations in detail, was repeated in a number of other cases before the Civil war.[28]

§ 182. But not all the judges were ready to accept the doctrine that the taxing power could be used for railroad aid and the objections which had been smoldering during the earlier period[29] blazed forth as a result of the liquidation which came in the era of Reconstruction. Many of the ventures in railroad finance had proved disastrous, and the amount of public money lost in this sort of collective speculation was undoubtedly enormous. It was but natural that the courts should have desired to find a way to check municipal extravagance.[30]

[26] "It can not be said that a citizen is deprived of his property when he is left in the undisturbed possession of it, whatever taxation may be imposed on it." Chief Justice Black, Sharpless v. Philadelphia, 21 Pa. St. (1853) 147 at 167, 59 Am. Dec. 759.

[27] "If the making of a railroad is a public duty, which the state may either do entirely at the public expense, or cause to be done entirely by a private corporation, it follows that such a work may be made partly by the state, and partly by a corporation, and the people may be taxed for a share of it, as rightfully as for the whole." Sharpless v. Philadelphia, 21 Pa. St. (1853) 147 at 170, 59 Am. St. 759. See also State v. Charleston, 10 Rich. L. (S. Car., 1857) 491. Concord R. R. v. Greely, 17 N. H. (1845) 47.

[28] Stein v. Mobile, 24 Ala. (1854) 591; Clarke v. Rochester, 14 How. Pr. (N. Y., 1857) 193; Maddox v. Graham, 59 Ky. (1859) 56; Aurora v. West, 9 Ind. (1857) 74; Johnson v. Stark, 24 Ill. (1860) 75.

[29] See Clark v. Rochester, 13 How. Pr. (N. Y., 1856) 204.

[30] Chief Justice Black pointed out the dilemma the courts were in by showing that, if this was declared not to be a public purpose, innocent bondholders would be swindled out of huge sums; while if the tax was upheld, it would open the door to public frauds of a host of varieties. Sharpless v. Philadelphia, 21 Pa. St. (1853) 147, 59 Am. Dec. 759. After a line of decisions upholding the power, the situation was still more complicated.

A number of judges seized upon due process in order to support their arguments. In the earlier cases, the question of whether aid to railroads violated this provision had been little considered. This gave the courts an opportunity to say that the implications of this phrase had not been thoroughly understood. As a result, the attitude of several courts changed sharply.[31]

The decisions of the Iowa court are an extreme example of this. Grants to railroads had been upheld before the Civil war,[32] but when the same question came up a decade and a half later, the court reversed itself in three important cases, the most important of which was Hanson v. Vernon.[33] Chief Justice Dillon in rendering the opinion of the court, discarded the time-worn argument that acts could be declared void because they violated "notions of natural equity or justice." But since the question of due process had not been presented when the case had been argued before,[34] the decision in this case was placed squarely upon that clause, as well as the inherent nature of the power to tax.[35]

[31] Sweet v. Hulbert, 51 Barb. (N. Y., 1868) 312, represents a direct reversal of the position of the New York Courts. See Clarke v. Rochester, 14 How. Pr. (N. Y., 1857) 193, 24 Barb. (N. Y., 1857) 446. The more recent case was cited with approval in People ex rel. v. Batchellor, 53 N. Y. (1873) 128. In regard to the Wisconsin decisions, see sec. 186, n. 58.

[32] Dubuque v. Dubuque & Pac. R. Co., 4 G. Greene (Iowa, 1853) 1.

[33] State v. Wapello County, 13 Iowa (1865) 388; McClure v. Owen, 26 Iowa (1868) 243; Hanson v. Vernon, 27 Iowa (1869) 28, 1 Am. Rep. 216.

[34] Justice Kinney in dissenting had urged that the law was virtually a taking of property of A. for the use of B. and that it was contrary to the inalienable right to own private property, in that it was a loan of the state's credit to individuals. Dubuque v. Dubuque & Pac. R. R., 4 G. Greene (Iowa, 1853) 1.

[35] "I think I shall be able to convince the impartial judgment of any lawyer or intelligent man, that the Act of 1868 is not a valid or legitimate exercise of the taxing power; that though the money demanded of the citizen is called a tax, it is not such, but is, in fact, a coercive contribution in favor of private railway corporations, and violative, not only of the general spirit of the constitution as to the sacredness of private property, but of that specific provision which declares that no man shall be deprived of his property without due process of law (Bill of Rights, sec. 9)—a provision which is adequate to protect the owner from being despoiled of his property by an unauthorized tax law or illegal tax. See Cooley on Const. Lim., p. 487, also pp. 479, 521, and cases cited." Hanson v. Vernon, 27 Iowa (1867) 28 at 45, 1 Am. Rep. 216.

§ 183. In answer to the contention that public purpose is the same for taxation as for eminent domain, the court attempted to distinguish between different degrees of public purpose.[36] The power of eminent domain is strictly limited in the mode of its exercise and the amount of property which may be taken; while it has been declared that the amount of tax which may be collected is unlimited,[37] and certainly it may be collected by a more summary procedure.[38]

Just how these distinctions between the two powers alters the publicity of the purpose in each is very difficult to see.[39]

More to the point is a contention of Cooley. In a Michigan case (People v. Salem[40]) he argued that, since all enterprises have something of a public interest, they can be regulated or aided only so far as settled usage demands.[41] But this argument fails to take into account

[36] Cincinnati W. & Z. R. Co. v. Clinton, 1 Ohio St. (1852) 77.

[37] The wisdom of this rule may well be questioned and should the court be given a very difficult case, it would raise some interesting constitutional questions. The rule that the power to tax is unlimited goes back to the *dictum* of Daniel Webster (repeated by Chief Justice Marshall) that "The power to tax is the power to destroy." McCulloch v. Maryland, 4 Wheat. (U. S., 1819) 316 at 327 and 421, 4 L. ed. 579. It is noteworthy that this maxim has only been used in that narrow group of cases where the tax might destroy a coordinate agency of government. It is doubtful if the courts would apply it where the tax was really a confiscation of a legitimate article or occupation. See Bailey v. Drexel Furn. Co., 259 U. S. (1922) 20, 66 L. ed. 817.

[38] See secs. 85, 89.

[39] Judge Dillon declared: "The property that can be taken by the exercise of the right of eminent domain is restricted to the actual amount required to execute the undertaking, and is generally limited to one hundred feet in width, and full value in money must be paid. This itself is a check against the abuse of the power. But the amount of the tax that may be levied is unlimited, and no return or compensation to the taxpayer is contemplated." Hanson v. Vernon, 27 Iowa (1869) 28 at 56, 1 Am. Rep. 216.

[40] 20 Mich. (1870) 452, 4 Am. Rep. 400.

[41] "Reasoning by analogy from one of the sovereign powers of government to another, is exceedingly liable to deceive and mislead. An object may be public in one sense and for one purpose, when in a general sense and for other purposes, it would be idle and misleading to apply the same term. All governmental powers exist for public purposes, but they are not necessarily to be exercised under the same conditions of public interest. The sovereign police power which the state possesses is to be exercised only for the general public welfare, but it reaches to every person, to every kind of business, to every species of property within the commonwealth.

the peculiar legal position of a railroad, which is the justification alike for the use of the power of eminent domain and that of taxation in its aid. This legal position is, in turn, based on a settled usage, and it is impossible to see how it could justify public purpose for one power and not for the other. To have been consistent, Cooley should have rested his case on the urgency of the public need or the extent of the public benefit which would flow from the exercise of these powers. This he refused to do because it could not be squared with his argument from settled usage.[42]

Here again he failed to strike deeper and to see that the settled usage which would justify the use of either power to promote railroad development, was the basis for the peculiar legal position of the carrier. The legal rights and liabilities of the corporation were the same, regardless of the power which was exercised to aid it. The Iowa court finally came around to this position, and in the same year as the Michigan case, it again indulged in judicial acrobatics and reversed for the second time its

. . . The sovereign power of taxation is employed in a great many cases where the power of eminent domain might be made more immediately efficient and available, if constitutional principles would suffer it to be resorted to; but each of these powers has its own peculiar and appropriate sphere, and the object which is public for the demands of one is not necessarily of a character to permit the exercise of another." People v. Salem, 20 Mich. (1870) 452 at 477, 478, 4 Am. Rep. 400.

On the other hand in Cincinnati, W. & Z. R. Co. v. Clinton, 1 Ohio St. (1852) 77, it had been urged that there was a difference between the public purposes which would justify the use of these powers. The court, however, declared, "Where the right of eminent domain stops, there the right to incur any obligations for the public stops." Page 97.

[42] Cooley pointed out that a tax may not be levied for religious purposes although that may be considered very important, and it can be levied to put through a street which may have only trivial importance as compared with the securing of a large factory in a city. "'Public purpose,' as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely a term of classification, to distinguish the object for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclination, interest or liberality." People v. Salem, 20 Mich. (1870) 452 at 485, 4 Am. Rep. 400.

For an ingenious attempt to differentiate between the purposes of these two powers, see the note of V. B. Denslow to Swan v. Williams, 2 Mich. (1852) 427 at 428.

position on this question.[43] This time the use of the taxing power in aid of construction was justified legally, partly on the ground of the importance of transportation in modern civilization, and partly on the peculiar legal position of the railroads.[44]

§ 184. The contention that due process of law prohibited aid to railroads required an answer.[45] Although this provision had not been mentioned in People v. Salem,[46] Cooley took specific occasion in a similar case the year following to place the reasoning on the more solid ground of the "law of the land."[47] The Iowa court saw no way around this difficulty, except by denying that due process was a limitation on the taxing powers.[48] Other courts,

[43] Stewart v. Polk County, 30 Iowa (1870) 9, 1 Am. Rep. 238. This is the law in Iowa now. Renwick v. Davenport & N. W. R. Co., 47 Iowa (1877) 511.

[44] The baleful effects of this attempt to distinguish between public purpose which would justify the use of eminent domain from that requisite to the use of the taxing power continued for several decades. It was reflected in Chicago, D. & V. R. Co. v. Smith, 62 Ill. (1871) 268, 14 Am. Rep. 99; Olcott v. Supervisors, 16 Wall. (U. S., 1872) 678, 21 L. ed. 382; Perry v. Keene, 56 N. H. (1876) 514; Prince v. Crocker, 166 Mass. (1896) 347, 44 N. E. 446, 32 L. R. A. 610.

[45] The Kansas court took occasion to distinctly repudiate the views of the Michigan court in Leavenworth v. Miller, 7 Kans. (1871) 479, 12 Am. Rep. 425. "No instance has been shown nor can be shown where the government may aid a thing by the power of eminent domain, where it can not also aid it by the power of taxation. No instance has been shown nor can be shown where the government may aid a thing by the exercise of any of its sovereign powers, where it may not also aid it by taxation." Page 527. "Why this distinction is made in favor of the right of eminent domain and against the right of taxation has never yet been shown and can not be shown. If any distinction is to be made, it should be . . . the other way—against the right of eminent domain and in favor of taxation." Page 529.

[46] 20 Mich. (1870) 452, 4 Am. Rep. 400.

[47] "Our constitution has carefully provided a shield against an invasion of the citizen's right to his property, in the provision which guarantees to every person due process of law.—Article VI, sec. 32. To take a man's property from him under pretense of taxation, for a purpose for which taxation is not admissible, is not due process of law, but is an unlawful confiscation." People ex rel. v. State Treasurer, 23 Mich. (1871) 499 at 502.

[48] "'Due process of law,' means ordinary judicial proceedings in court. . . . So that if this clause of the constitution is held to apply to the taxing power, then no tax whatever for the support of the government can legally be levied and collected, except through the means of judicial proceedings in the courts: whereas it is well known that the sovereign power of taxation belongs exclusively to the legislative department of the govern-

notably the Supreme Court of the United States, preferred to ignore it, even though counsel frequently urged that there had been a violation of the Fourteenth Amendment.[49] As late as 1896, the Massachusetts Supreme Court passed off a contention that due process had been violated with the simple answer, "We think it is unfounded."[50] In each case, however, the courts went carefully into the question of public purpose, and having disposed of it, there was little reason to again repeat the argument under the caption of "Due Process of Law."

§ 185. Although there are a few cases, outside of Michigan, where these acts have been held void on special grounds,[51] by 1890 the constitutionality of the power to

ment, and that all taxes are levied and collected in pursuance of legislative enactments, without the aid of the courts. This clause has no reference whatever to the taxing power, and where property is taken in the lawful exercise of the taxing power, it is not taken 'without due process of law'." Stewart v. Polk County, 30 Iowa (1870) 9 at 28, 1 Am. Rep. 238. This is a direct reflection of Sharpless v. Philadelphia, 21 Pa. St. (1853) 147 at 167, 59 Am. Dec. 759.

[49] Chicago, D. & V. R. Co. v. Smith, 62 Ill. (1871) 268, 14 Am. Rep. 99; Leavenworth v. Miller, 7 Kans. (1871) 479, 12 Am. Rep. 425; Gelpcke v. Dubuque, 1 Wall. (U. S., 1863) 175, 17 L. ed. 520; Chicago, B. & Q. R. Co. v. Otoe, 16 Wall. (U. S., 1872) 667, 21 L. ed. 375; Olcott v. Supervisors, 16 Wall. (U. S., 1872) 678, 21 L. ed. 382; Queensbury v. Culver, 19 Wall. (U. S., 1873) 83, 22 L. ed. 100; Pine Grove v. Talcott, 19 Wall. (U. S., 1873) 666, 22 L. ed. 227; Perry v. Keene, 56 N. H. (1876) 514; Taylor v. Ypsilanti, 105 U. S. (1881) 60, 26 L. ed. 1008; Sun Print. & Pub. Assn. v. New York, 8 App. Div. (1896) 230, 40 N. Y. S. 607, affd. 152 N. Y. (1897) 257, 46 N. E. 499.

[50] Prince v. Crocker, 166 Mass. (1896) 347 at 361, 44 N. E. 446, 32 L. R. A. 610.

[51] Lafayette v. Cox, 5 Ind. (1854) 38 (aid ultra vires under city charter); Oelrich v. Pittsburg, 5 Pa. L. J. (1859) 485, Fed. Cas. No. 10442 (aid ultra vires under city charter); Gilman v. Sheboygan, 2 Black (U. S., 1862) 510, 17 L. ed. 305 (void under Wisconsin provision that all taxes must be uniform); People ex rel. v. Batchellor, 53 N. Y. (1873) 128 (legislature can not force a municipality to give railroad aid); Dyar v. Farmington Village Corp., 70 Maine (1878) 515 (taxes must be uniform under benefit theory); Floyd v. Perrin, 30 S. Car. (1888) 1, 8 S. E. 14, 2 L. R. A. 242 (act ultra vires under city charter); Herreid v. Ettrick & N. R. Co., 179 Wis. (1923) 516, 192 N. W. 54.

An especially interesting case came up in Maryland. Residents of a town had bought stock in a railroad which afterward went bankrupt. The town then voted to donate a sum of money to the railroad on the condition that creditors who lived in the town should be satisfied from it before other creditors. The court saw through the thin veil of disguise and recognized that it was only an attempt to get the town to take over bad

use taxation to aid railroad construction was well established, both in the federal[52] and in the state courts.[53] So completely is the doctrine accepted that the grant may be constitutionally made to a railroad which does not enter the municipality making it, or indeed, which does not even

debts. The grant was declared void because it was not for the "benefit of the community," as required by the Maryland constitution. Baltimore &c. R. Co. v. Spring, 80 Md. (1895) 510, 31 Atl. 208, 27 L. R. A. 72.

[52] Amey v. Allegheny City, 24 How. (U. S., 1860) 364, 16 L. ed. 614; Rogers v. Burlington, 3 Wall. (U. S., 1865) 654, 18 L. ed. 79; Olcott v. Supervisors, 16 Wall. (U. S., 1872) 678, 21 L. ed. 382; Pine Grove v. Talcott, 19 Wall. (U. S., 1873) 666, 22 L. ed. 227; Fairfield v. Gallatin, 100 U. S. (1879) 47, 25 L. ed. 544; Harter v. Kernochan, 103 U. S. (1880) 562, 26 L. ed. 411; Louisville v. Savings Bank, 104 U. S. (1881) 469, 26 L. ed. 775; Taylor v. Ypsilanti, 105 U. S. (1881) 60, 26 L. ed. 1008; Anderson v. Santa Anna, 116 U. S. (1886) 356, 29 L. ed. 633; Bolles v. Brimfield, 120 U. S. (1887) 759, 30 L. ed. 786; Folsom v. Township Ninety-Six, 159 U. S. (1895) 611, 40 L. ed. 278.

[53] Nichol v. Nashville, 28 Tenn. (1848) 252; Talbott v. Dent, 9 B. Mon. (Ky., 1849) 526; Slack v. Maysville & L. R. Co., 13 B. Mon. (Ky., 1852) 1; Cincinnati, W. & Z. R. Co. v. Clinton Co., 1 Ohio St. (1852) 77; Cass v. Dillon, 2 Ohio St. (1853) 607; Police Jury v. Succession of McDonogh, 8 La. Ann. (1853) 341; Stein v. Mobile, 24 Ala. (1854) 591; Louisville &c. R. Co. v. Davidson Co., 33 Tenn. (1854) 637; Cotton & Ponder v. County Commrs. of Leon County, 6 Fla. (1856) 610; St. Louis v. Alexander, 23 Mo. (1856) 483; Powers v. Inferior Court of Dougherty Co., 23 Ga. (1857) 65; Aurora v. West, 9 Ind. (1857) 74; Grant v. Courter, 24 Barb. (N. Y., 1857) 232; State v. Charleston, 10 Rich. L. (S. Car., 1857) 491; Prettyman v. Tazewell, 19 Ill. (1858) 406, 71 Am. Dec. 230; Bank of Rome v. Rome, 18 N. Y. (1858) 38; Caldwell v. Justices of Burke, 4 Jones Eq. (N. Car., 1858) 323; State ex rel. v. Trustees of Union Township, 8 Ohio St. (1858) 394; Pattison v. Yuba, 13 Cal. (1859) 175; Robertson v. Rockford, 21 Ill. (1859) 451; Maddox v. Graham & Knox, 59 Ky. (1859) 56; McCallie v. Chattanooga, 40 Tenn. (3 Head, 1859) 317; Gibbons v. Mobile & G. N. R. Co., 36 Ala. (1860) 410; Perkins v. Lewis, 24 Ill. (1860) 208; Augusta Bank v. Augusta, 49 Maine (1860) 507; Butler v. Dunham, 27 Ill. (1861) 474; Starin v. Genoa, 23 N. Y. (1861) 439; Gould v. Sterling, 23 N. Y. (1861) 439, 456; Robinson v. Bidwell, 22 Cal. (1863) 379; Keithsburg v. Frick, 34 Ill. (1864) 405; Atchison v. Butcher, 3 Kans. (1865) 104; Napa Valley R. Co. v. Napa, 30 Cal. (1866) 435; People v. Mitchell, 45 Barb. (N. Y., 1865) 208, 35 N. Y. Ct. of Appeals (1866) 551; San Antonio v. Jones, 28 Tex. (1866) 19; St. Joseph, D. & C. R. Co. v. Buchanan County Ct., 39 Mo. (1867) 485; San Antonio v. Lane, 32 Tex. (1869) 405; Ex parte Selma & Gulf R. Co., 45 Ala. (1871) 696, 6 Am. Rep. 722; Walker v. Cincinnati, 21 Ohio St. (1871) 14, 4 Am. Rep. 24; Hill v. Commrs., 67 N. Car. (1870) 367; Allison v. Louisville, H. C. & W. R. Co., 10 Bush (Ky., 1873) 1; Chicago &c. R. v. Pinckney, 74 Ill. (1874) 277; Petty v. Myers, 49 Ind. (1874) 1; Opelika v. Daniel, 59 Ala. (1877) 211; Bennington v. Park, 50 Vt. (1877) 178; Lauderdale v. Fargason, 75 Tenn. (1881) 153. See also 12 *Corpus Juris*, 1254, 1255, and notes to secs. 181-184, *supra*.

enter the state.[54] The United States Supreme Court has been so sure of itself in this type of case, that it has broken its rule and will not follow the Michigan precedents in those cases which involve only Michigan law.[55]

§ 186. Some of the statutes authorized municipalities either to subscribe to railroad stock or bonds, or to give a donation outright for its aid. At first blush, it might seem that the second was true exercise of the taxing power, while the first was merely loan of public credit from which the city might reasonably expect a pecuniary return. Indeed, in one of the earliest cases involving the power to aid railroads, the court upheld the action of the city on the ground that it would probably receive profits from its investment.[56] Following this line of reasoning, some courts have refused to sustain donations, although loans of public credit to railroads have been upheld. The attitude of the New York court seems only explicable on this ground,[57] and the distinction between these two forms

[54] Burnes v. Atchison, 2 Kans. (1864) 454 (railroad in another state); Adams v. Memphis R. Co., 42 Tenn. (1866) 645 (railroad did not enter city); Chicago, B. & Q. R. Co. v. Otoe, 16 Wall. (U. S., 1872) 667, 21 L. ed. 375 (railroad was in another state).

[55] This was foreshadowed in Olcott v. The Supervisors, 16 Wall. (U. S., 1872) 678, 21 L. ed. 382, and was the basis of the decision in Pine Grove v. Talcott, 19 Wall. (U. S., 1873) 666, 22 L. ed. 227, and Taylor v. Ypsilanti, 105 U. S. (1881) 60, 26 L. ed. 1008. See also Anderson v. Santa Anna, 116 U. S. (1886) 356, 29 L. ed. 633; Bolles v. Brimfield, 120 U. S. (1887) 759, 30 L. ed. 786.

In matters of public purpose they usually follow the decisions of the state courts when it is a matter of state law, "However much we may doubt the soundness of their views." Covington v. Kentucky, 173 U. S. (1889) 231, 43 L. ed. 679.

Even when the court was confronted with an exceptionally serious abuse of the power to aid railroads, they refused to turn from their position. In the case involving the validity of the grants of lake frontage in Chicago to the Illinois Central R., Justice Field did not rest his decision declaring the grants void, on the ground of public purpose. He rather chose the exceedingly doubtful ground that submerged land in navigable bodies of water is not alienable. Illinois Cent. R. Co. v. Illinois, 146 U. S. (1892) 387, 36 L. ed. 1018. The grant of public land to private individuals has been held void in Winters v. Myers, 92 Kans. (1914) 414, 140 Pac. 1033.

[56] Cincinnati v. Clinton County, 1 Ohio (1852) 77.

[57] Contrast Clarke v. Rochester, 24 Barb. (N. Y., 1857) 446, 5 Abb. Prac. 107, 14 How. Pr. 193, with Sweet v. Hulbert, 51 Barb. (N. Y., 1868) 312, and People ex rel. v. Batchellor, 53 N. Y. (1873) 128. In the

of aid forms the basis of the Wisconsin rule at the present time.[58]

A closer scrutiny, however, makes it evident that there is no real difference between the two powers in this regard.[59] If the credit of the state is given the company, it may result in increased taxation to make good the loss, and in any case, the increased indebtedness may necessitate higher rates of interest on other state or municipal debts. Furthermore, the real problem from the point of view of due process of law, is whether the railroad is a public purpose which may be aided financially by the state. If it is public, no objection can be made to a direct donation above that which might also be urged against the indirect donation of a stock subscription.

The Supreme Court of the United States has consistently taken this view and has held that there is no distinction between the cases in this regard.[60] In accordance

latter cases it was said that gifts of money to railroads were void, in the first there was merely a subscription to stock from which the city might get profit.

[58] In the earlier Wisconsin cases the court upheld the power of the legislature to authorize municipalities to subscribe to railroad stock or bonds. Clark v. Janesville, 10 Wis. (1859) 136; Bushnell v. Beloit, 10 Wis. (1860) 195, 196. The court has strictly followed this rule in all subsequent cases. Rogan v. Watertown, 30 Wis. (1872) 259, 260; Lawson v. Milwaukee & N. R. Co., 30 Wis. (1872) 597; Oleson v. Green Bay & Lake Pepin R. Co., 36 Wis. (1874) 383. But the abuses which grew out of the loans to railroads caused this court, as had been the case in Iowa and Michigan, *supra*, secs. 182, 183, to react against the power. Rather than to repudiate their decisions, they chose to limit them very strictly and so held that the legislature could not authorize donations of money or land to railroads. Whiting v. Sheboygan Fon du Lac R. Co., 25 Wis. (1870) 167, 3 Am. Rep. 30; Phillips v. Albany, 28 Wis. (1871) 340; Ellis v. Northern Pac. R. Co., 77 Wis. (1890) 114, 45 N. W. 811 (donation of land). Although the court will construe an act as only authorizing a loan of credit if it is possible to do so, Bound v. Wisconsin Cent. R. Co., 45 Wis. (1878) 543, the court has said that it followed the earlier rule only because of precedent. Ellis v. North. Pac. R. Co., 77 Wis. (1890) 114, 45 N. W. 811. In 1923 the limits were drawn still more closely and it was held that while a new railroad may be aided an old one may not. Herreid v. Ettrick & H. R. Co., 179 Wis. (1923) 516, 192 N. W. 54.

[59] See particularly Chicago R. Co. v. Smith, 62 Ill. (1871) 268; Petty v. Meyers, 49 Ind. (1874) 1.

[60] Chicago, B. & Q. R. Co. v. Otoe County, 16 Wall. (U. S., 1872) 667, 21 L. ed. 375; Olcott v. The Supervisors, 16 Wall. (U. S., 1872) 678, 21 L. ed. 382; Pine Grove v. Talcott, 19 Wall. (U. S., 1873) 666, 22 L. ed. 227; Taylor v. Ypsilanti, 105 U. S. (1881) 60, 26 L. ed. 1008; Queensbury

with this reasoning, it has been held that it makes no difference if the aid is in the nature of a grant of money or of public property, so long as the city has the power to divest itself of that property.[61]

The development of due process as a restriction upon legislative grants to public utilities, has been choked off by a number of circumstances. The great era of railroad building is past and there is no longer the need of rapid extension of transportation facilities into newly developing areas. The temptation to use the funds of the state for this purpose has become, accordingly, less serious. Furthermore, most of the states have recognized the iniquities of this practice and have written specific provisions into their fundamental law to prohibit it.[62] Consequently, if a grant does not violate the Fourteenth Amendment, it does not violate the state Constitution.[63]

§ 187. When the powers of government are used to aid corporations which have not been hitherto recognized as public utilities, a much more difficult case is presented. The court is required to apply the established principles to new conditions which are sometimes only remotely similar to the one which gave rise to the rules they have been following. The earliest of these cases involving the constitutionality of the mill acts. In order to develop the manufacturing resources of the state, the legislatures of the colonial and early state governments had frequently given private companies the right to dam rivers and to overflow lands above the dam, if compensation was made to the riparian owners for the consequential damages. It

v. Culver, 19 Wall. (U. S., 1873) 83, 22 L. ed. 100, and Moultrie v. Fairfield, 105 U. S. (1881) 370, 26 L. ed. 945, are directly in point.

[61] Sun Print. & Pub. Assn. v. New York, 152 N. Y. (1897) 257, 46 N. E. 499; Prince v. Crocker, 166 Mass. (1896) 347, 44 N. E. 446; Admiral Realty Co. v. New York, 206 N. Y. (1912) 110, 99 N. E. 241; Cincinnati So. R. v. Roth, 2 Ohio App. (1913) 195; State ex rel. v. Cincinnati St. R. Co., 97 Ohio St. (1918) 283, 119 N. E. 735; Milheim v. Moffat Tunnel Imp. Dist., 262 U. S. (1923) 710, 67 L. ed. 1194.

[62] See sec. 165.

[63] Nakdimen v. Ft. Smith & Van Buren Bridge Dist., 115 Ark. (1914) 194, 172 S. W. 272.

would seem at first that this is a clear case of the use of the power of eminent domain for private purposes, and some courts have so held.[64]

These acts, however, are deeply rooted in custom and tradition. The grist mills on the English manors had always been somewhat of a public function for they were required to grind for the public at reasonable rates.[65] This practice was also the rule in the American colonies and in some cases specifically required by statute.[66] The practice of condemning private property for this purpose was, therefore, well established before it was contested in the courts. The first cases did not come up until after 1830.[67] At first it was assumed that these mills were public in nature and the acts were accordingly upheld. In 1849 this point was particularly urged and the court declared that it made no difference if the mill was a public one or not.[68] Throughout these earlier cases it is evident that the courts were greatly impressed with the public importance of the development of mill sites and this, coupled with the traditional basis upon which the acts rested, was doubtless the basis for their decisions.[69]

[64] Sadler v. Langham, 34 Ala. (1859) 311 (one of the grounds for declaring the act void was that it violated "due course of law" because there was no public purpose); Loughbridge v. Harris, 42 Ga. (1871) 500, 501; Ryerson v. Brown, 35 Mich. (1877) 333, 24 Am. Rep. 564; Gaylord v. Sanitary Dist., 204 Ill. (1903) 576, 68 N. E. 522; Dice v. Sherman, 107 Va. (1907) 424, 59 S. E. 388. See also In re Barre Water Co., 62 Vt. (1889) 27, 20 Atl. 109.

[65] Blackstone, Commentaries, Vol. III, p. 235. An excellent review of the position of the English mills is to be found in Boston & Roxbury Mill-Dam Corp. v. Newman, 12 Pick. (Mass., 1832) 467.

[66] Tyler v. Beacher, 44 Vt. (1871) 643, 8 Am. Rep. 398; Southwest Mo. L. Co. v. Scheurich, 174 Mo. (1903) 325, 73 S. W. 496. See also C. K. Burdick, Law of the American Constitution (N. Y., 1922) 522, 523; Lewis, Eminent Domain (3d ed.), Vol. I, secs. 275-281.

[67] Fiske v. Framingham Mfg. Co., 12 Pick. (Mass., 1831) 68; Boston & Roxbury Mill-Dam Corp. v. Newman, 12 Pick. (Mass., 1832) 467, 23 Am. Dec. 622; Scudder v. Trenton Delaware Falls Co., 1 N. J. Eq. (1832) 694, 23 Am. Dec. 756; Hankins v. Lawrence, 8 Blackf. (Ind., 1846) 266.

[68] Lumbard v. Stearns, 4 Cush. (Mass., 1849) 60; Head v. Amoskeag Mfg. Co., 113 U. S. (1884) 9, 28 L. ed. 889.

[69] The statement of C. J. Shaw of the Massachusetts court is typical of this view. "The establishing of a great mill power for manufacturing purposes, as an object of great public interest, especially since manufacturing has come to be one of the great public industrial pursuits of the com-

§ 188. The cases involving the mill acts were not very fruitful as far as due process of law was concerned. In most of the decisions it was not even mentioned, and it must be concluded that the judges either ignored it or else failed to see its importance in this regard. Even when its relation to public purpose was considered, it was only in passing and was a distinctly minor element in the case.[70]

monwealth, seems to have been regarded by the legislature, and sanctioned by the jurisprudence of the commonwealth, and, in our judgment, rightly so, in determining what is a public use, justifying the exercise of the right of eminent domain. . . . That the erection of this dam would have a strong and direct tendency to advance both these public objects, there is no doubt. We are therefore of the opinion that the powers conferred on the corporation by this act were so done within the scope of the authority of the legislature, and were not in violation of the constitution of the commonwealth." Hazen v. Essex Co., 12 Cush. (Mass., 1853) 475 at 477. See also the excellent review of these earlier cases in Cooley, Constitutional Limitations, (6th ed.) 657-660.

The Massachusetts court has also attempted to justify their rule on the ground that the legislature has a peculiar function in adjusting the rights of riparian owners along flowing streams. The public has a special interest in the streams and so owners may be placed under more stringent regulations than might otherwise be imposed. Furthermore, there is an element of joint ownership here which the legislature may regulate. Fiske v. Framingham Mfg. Co., 12 Pick. (Mass., 1831) 68. This view has the approval of the United States Supreme Court in Head v. Amoskeag Mfg. Co., 113 U. S. (1885) 9, 28 L. ed. 889. It is difficult to see how either of these points affect the question of public purpose. Even if it be granted that the mill acts do not rest on the power of eminent domain, no power of government can be exercised for any but a public purpose. Consequently, unless it can be said that it is a public purpose to foster manufacturing, it is hard to see how the statutes can be upheld.

Another point centers around the incidental nature of the taking of the property. This again is a Massachusetts doctrine and has been adopted by the United States Supreme Court. Manigault v. Springs, 199 U. S. (1905) 473, 50 L. ed. 274; Otis Co. v. Ludlow Mfg. Co., 201 U. S. (1906) 140, 50 L. ed. 696. This, of course, has nothing whatever to do with the publicity of the purpose for which the property was taken. Merely because a small amount of property is condemned is immaterial to the purpose which is to be served.

[70] In Venard v. Cross, 8 Kans. (1871) 248, the court flatly declared that no provision in the constitution was violated by the mill act. There was no mention of due process of law. On the other hand, in Sadler v. Langham, 34 Ala. (1859) 311, the court in passing declared that the mill act would violate "due course of law" unless the mills were compelled to grind for toll.

The strongest statement in this regard was made by the Georgia court. "Outside of the national constitutional provision on this subject, we find the doctrine implanted in our fundamental principles: 'No person shall be deprived of property without due process of law.' And when the legislature solemnly enacts the appropriation and provides for the compensation,

A more significant line of cases arose in connection with the attempts of the legislatures to use the power of taxation to aid in private industrial enterprises. With the example of aid to railroads before them, other enterprises could see no reason why they should not receive public assistance, and the pressure for special legislative benefits to manufacturing concerns became enormous. In 1871 the Maine legislature submitted the question of the constitutionality of such aid to the court for an opinion. The reply indicated that, although there was a unanimous feeling that an act for this purpose would be void, the justices were by no means agreed on the reasons for their views.[71] Some declared that such an act would violate the inherent rights of property, others exhumed the moss-covered doctrine that laws contrary to the "principles of common right and reason" are void, and still others placed their opinion on the ground that there was no necessity for an exercise of the power.[72]

Four members of the court, however, went much further. They admitted that public necessity might be a controlling factor, but they pointed out that under ordinary conditions a grant of public credit to private enterprises would violate "the law of the land." Since this protection could not be evaded by a mere act of the legislature, and since it was well settled that the property of one individual

being the act of the law making power, it is under process of law. But the power must be exercised, by the legislature, under the two limitations referred to. The requirement must be for public use and the compensation must be provided." Loughbridge v. Harris, 42 Ga. (1871) 500, 503.

This is true of even the more recent cases. Ingram v. Maine Water Co., 98 Maine (1904) 566, 57 Atl. 893; McMillan v. Noyes, 75 N. H. (1909) 258, 72 Atl. 759; Sexauer v. Star Milling Co., 173 Ind. (1910) 342, 90 N. E. 474, 26 L. R. A. (N. S.) 609.

[71] In re Opinion of the Justices, 58 Maine (1871) 590.

[72] J. Tapley indicated that the peculiar circumstances must determine the opinion of the court. "Changing conditions of men bring with them new demands, demands that must be granted or refused upon the application of old principles; principles although of long standing yet designed to meet the varying conditions of society; so inflexible as to preserve the rights of all, and yet so flexible as to meet all the requirements of a government designed to promote to the highest degree, political equality in government and intelligence and morality in the people." In re Opinion of the Justices, 58 Maine (1871) 590 at 623.

could not be taken from him for the benefit of another, the court concluded that the basis for the rule that taxation must be for a public purpose was the due process provision.[73] The court pointed out that "there is nothing of a public nature any more entitling the manufacturer to public gifts than the sailor, the mechanic, the lumberman, or the farmer."[74] In spite of this adverse opinion, public funds were given to manufacturing concerns, and the year following, the court repeated its conclusion in even more vigorous terms in the case of Allen v. Jay.[75]

§ 189. The Maine case had involved only a loan of public credit, but there arose a case in Kansas which involved the constitutionality of a direct gift of public money to a manufacturing enterprise. The City of Topeka, acting under the Kansas statute, presented a bridge company with $100,000 worth of municipal bonds on condition that the plant of the corporation should be located in the city. The first case involving this act came before Justice Dillon of the United States Circuit Court. In a very careful opinion, he declared the act void on the ground that the public had no control over the company after the bonds had been donated, and consequently the corporation could not be considered public. The incidental benefits which the town might derive from the location of the factory in

[73] C. J. Appleton declared, "Property taken by taxation is not to be taken by the judgment of our peers. A statute in direct violation of the primary principles of justice is not 'the law of the land' within the meaning of the constitution. Every citizen holds life, liberty and property by the law and under its protection. Every enactment is not of itself and necessarily a law or the law of the land. Such is not a statute passed for the very purpose of working a wrong and in violation of the constitution. To declare it to be so would render this part of the constitution nugatory and nonsensical." In re Opinion of the Justices, 58 Maine (1871) 590 at 595.

[74] In re Opinion of the Justices, 58 Maine (1871) 590 at 595.

[75] 60 Maine (1872) 124, 11 Am. Rep. 185. The question asked by the Chief Justice is a very pertinent one. "Can anyone conceive a more arbitrary exercise of the powers of government than the enforced collection of money from one man to lend the same to another?" The only other early case in the state courts involving this point was Bissell v. Kankakee, 64 Ill. (1872) 249, 21 Am. Rep. 554, in which a municipal bond issue to aid a linen mill was held void as being ultra vires under the city charter.

it, would not justify so arbitrary an invasion of the rights of the taxpayer.[76]

Another case involving the same question was appealed to the United States Supreme Court, only to meet with a similar fate.[77] Justice Miller pointed out that the rule regarding railroads was not unanimously accepted at that time (1874), and even if it were admitted, that grants to carriers were valid, that rule went to the very edge of the legislative power.[78] Furthermore, no one could contend that a bridge factory was a common carrier. But the real problem in the case was not so much the question of the validity of the act as it was the clause which had been violated. In its search for a provision of the constitution which forbade grants to private corporations, the court was unsuccessful. The relation between natural justice and due process of law was either not appreciated by the judges, or else it was purposely avoided. In view of the other decisions of the period, it is probable that the latter was the case.[79]

The long and labored opinion of Justice Miller is ample evidence of the difficulties involved in ignoring due process of law when an especially arbitrary statute is presented to the court. The principles of free government, the danger of despotic power in the hands of the majority, and the inherent limits of the taxing powers were all marshaled with an admirable array of rhetoric.[80] His plea against

[76] Commercial Nat. Bank v. Iola, 2 Dill. (1873) 353, Fed. Cas. No. 3001 at p. 224. "If this salutary principle be abandoned, we unsettle the foundations of private property, and unwisely open the door for frauds and abuses of the most alarming character." That the town would lose all control over the industry as soon as the money had been given was also pointed out in Allen v. Jay, 60 Maine (1872) 124, 11 Am. Rep. 185.

[77] Citizens' Sav. Assn. v. Topeka, 3 Dill. (1874) 376; affd. Loan Assn. v. Topeka, 20 Wall. (U. S., 1874) 655, 22 L. ed. 455.

[78] See also Commercial Nat. Bank v. Iola, 2 Dill. (1873) 353.

[79] Charles Warren, The Supreme Court in United States History (Boston, 1923), Vol. III, pp. 291, 292.

[80] "It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognizes no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all, but a despotism.

giving grants to private corporations was exceedingly fervid, but, as Justice Clifford pointed out in his dissenting opinion, it was entirely beside the point. If it be admitted that due process does not prohibit such an abuse of legislative power as this, the real question is whether the Tenth Amendment means what it says.

§ 190. This decision has been consistently followed, both in the federal[81] and the state courts,[82] and its principles have been extended to cases involving only a loan of public credit to private enterprises.[83] It was not, how-

It is true it is a despotism of the many of the majority, if you choose to call it so, but it is none the less a despotism."

"The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B., who were husband and wife to each other, should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should hereforth be the property of B.

"Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitutions or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the national defense, any limitation is unsafe." Loan Assn. v. Topeka, 20 Wall. (U. S., 1874) 655 at 662, 663, 22 L. ed. 455

[81] Sutherland-Innes Co. v. Evart, 86 Fed. (1898) 597.

[82] Attorney General v. Eau Claire, 37 Wis. (1875) 400; Weismer v. Douglas, 64 N. Y. (1876) 91, 21 Am. Rep. 586; Central Branch U. P. R. Co. v. Smith, 23 Kans. (1880) 745; Mather v. Ottawa, 114 Ill. (1885) 659, 3 N. E. 216; MacKenzie v. J. W. Wooley, Tax Collector, 39 La. Ann. (1887) 944; Coates v. Campbell, 37 Minn. (1887) 498, 35 N. W. 366; Clee v. Sanders, 74 Mich. (1889) 692, 42 N. W. 154; Chaska v. Hedman, 53 Minn. (1893) 525, 55 N. W. 737; Markley v. Mineral City, 58 Ohio St. (1898) 430, 51 N. E. 28; Winters v. Myers, 92 Kans. (1914) 414, 140 Pac. 1033. Compare also the view in In re Eureka Basin Warehouse & Mfg. Co., 96 N. Y. (1884) 42. The only exception to the rule seems to be Minneapolis v. Janney, 86 Minn. (1902) 111, 90 N. W. 312, but here the grant was for a semi-charitable purpose.

[83] Parkersburg v. Brown, 106 U. S. (1882) 487, 27 L. ed. 238; Osborne v. Adams County, 109 U. S. (1883) 1, 27 L. ed. 835; Cole v. La Grange, 113 U. S. (1884) 1, 28 L. ed. 896; McConnell v. Hamm, 16 Kans. (1876)

ever, until 1901 that any court took occasion to link it with the concept of due process of law.[84] Logically this was inevitable. Unless the Fourteenth Amendment covers cases which involve the arbitrary transfer of the property from one group of individuals to another group, it is difficult to see how it is of any value as a constitutional guarantee. Furthermore, the court had by that time developed this clause as a restriction on the arbitrary exercise of the power of classification, the police power and the power of eminent domain. Under these circumstances, it could hardly refrain from extending it to similar abuses under the guise of the taxing power.[85] The fact that taxation is so essential to the conduct of government has made the judges very loath to interfere in this type of case. If there is the least pretext upon which they may stand, the powers of the legislature will be upheld.[86] It is evident, there-

228; English v. People, 96 Ill. (1880) 566; Fergus Falls v. Fergus Falls Hotel Co., 80 Minn. (1900) 165, 83 N. W. 54.

[84] Dodge v. Mission Tp., 107 Fed. (1901) 827. An attorney had urged that a similar act violated due process in Weismer v. Douglas, 64 N. Y. (1876) 91, 21 Am. Rep. 586, but the court refused to adopt his position. Some of the cases involving grants to manufacturing enterprises rest on the particular provisions of the state constitution. English v. People, 96 Ill. (1880) 566; Mather v. Ottawa, 114 Ill. (1885) 659, 3 N. E. 216; Hackett v. Ottawa, 99 U. S. (1878) 86, 25 L. ed. 363.

[85] Laws which have been declared void because private enterprises could not be aided by taxation or eminent domain are as follows: Howard Mills Co. v. Schwartz Lumber & Coal Co., 77 Kans. (1908) 599, 95 Pac. 559, 18 L. R. A. (N. S.) 356 (mill company can not use eminent domain to enlarge its plant); Neitzel v. Spokane International R. Co., 65 Wash. (1911) 100, 117 Pac. 864, 36 L. R. A. (N. S.) 522 (grocery may not be given power of eminent domain); In re Opinion of the Justices, 118 Maine (1919) 503, 106 Atl. 865 (public reservoirs can not be given to private water companies); Ormsby Land Co. v. Pittsburgh, 276 Pa. (1923) 68, 119 Atl. 730 (public land can not be leased to private corporation); Reed v. Seattle, 124 Wash. (1923) 185, 213 Pac. 923 (oiling station can not be given power of eminent domain).

[86] Recently the United States Supreme Court has carried this tendency to the extent of declaring that an individual can not bring suit to enjoin the collection of a tax for a private purpose. Massachusetts v. Mellon, 262 U. S. (1923) 447, 67 L. ed. 1078. The basis for this decision seems to be that an individual taxpayer has no direct interest in the disposition of the public funds and so could not suffer a direct injury from an appropriation to an unconstitutional purpose. Consequently, the court is presented with a purely hypothetical case, and following their long established rule, (see the incident cited in Muskrat v. United States, 219 U. S. (1911) 346 at 354, 55 L. ed. 246) they refused to consider it. This decision seems

fore, that it would require an exceptionally arbitrary case before acts giving public aid to private enterprises would be held void.

§ 191. The attitude of the courts toward questions of public purpose in taxation is excellently shown in the cases involving bounty laws. Unless the bounty has a direct definite relation to public health or safety,[87] it is undoubtedly merely a modified form of a gift of public money to private enterprises. It is hard to see, therefore, why it should not go the way of the more obvious gifts to private manufacturing concerns. Nevertheless, the courts hesitate to declare bounties void, and the same court which wrote the most vigorous opinion condemning aid to railroads, upheld a salt bounty of ten cents per barrel.[88] Bounties to sugar producers were less successful, and a number of courts, following the reasoning in the Topeka Bridge Company Case,[89] declared them void as contrary to the essence of free government or the general principles of the constitution.[90] On similar grounds a bounty on forest trees was declared unconstitutional.[91]

to be in direct contradiction to the well-nigh universally established rule in the states that a taxpayer does have a direct interest in the public funds, as well as being contrary to certain implications of former decisions of the federal court. Should it be followed literally, there can be no doubt that it will cause great inconvenience. It would present an interesting situation if a case involving an undoubtedly void expenditure of public funds were presented to the court. The Mellon case involved the constitutionality of the Maternity Law of 1921, which seems directly in line with other well recognized uses of federal funds. Walter Thompson, Federal Centralization (N. Y., 1923), pp. 140-162, esp. 155.

87 As is the case in the California bounty on coyotes. Ingram v. Colgan, 106 Cal. (1894) 113, 38 Pac. 315, 39 Pac. 437. In this case, as the court pointed out, the bounty was not a gift, but was really a payment for service rendered.

88 People v. Board of State Auditors, 9 Mich. (1861) 327; East Saginaw Mfg. Co. v. East Saginaw, 19 Mich. (1869) 259, 2 Am. Rep. 82. Contrast these cases with People v. Salem, 20 Mich. (1870) 452, 4 Am. Rep. 400 (holding public grants to railroads void).

89 Loan Assn. v. Topeka, 20 Wall. (U. S., 1874) 655, 22 L. ed. 455.

90 Michigan Sugar Co. v. Auditor General, 124 Mich. (1900) 674, 83 N. W. 625; Minnesota Sugar Co. v. Iverson, 91 Minn. (1903) 30, 97 N. W. 454; Oxnard Beet Sugar Co. v. State, 73 Nebr. (1905) 57, 102 N. W. 80, 105 N. W. 716.

91 "The principle announced by these authorities is not founded on, or deduced from, positive, affirmative constitutional provisions, but on and

In 1890 the United States congress passed an act providing for a sugar bounty under certain conditions. Although the District of Columbia court declared this law void,[92] the question was never directly passed on by the United States Supreme Court. In two important cases the question of the sugar bounty act was before the court, but in each case they carefully evaded the issue of its constitutionality.[93] It is significant, however, to note that the bounty was upheld in so far as to create a moral obligation which Congress might appropriate money to meet.[94] It is evident that the court will uphold a congressional appropriation if there is any plausible basis for it at all. The implied restriction on the power of Congress to expend the public funds has never been applied by the Supreme Court,[95] and it would undoubtedly take a very strong case to pry the court loose from its adherence to this rule.[96]

§ 192. If it be admitted that due process requires taxation to be for a public purpose,[97] and if donations to enter-

from the limitations of the taxing power itself. Our constitution, therefore, on this subject, is simply declaratory of the common law and of general principles, well recognized and almost of universal application." Justice Thomas, Deal v. Mississippi County, 107 Mo. (1891) 464 at 471, 18 S. W. 24.

92 United States v. Carlisle, 5 App. D. C. (1895) 138. This portion of the opinion was purely *dicta*.

93 Field v. Clark, 143 U. S. (1892) 649 at 695, 36 L. ed. 294; United States v. Realty Co., 163 U. S. (1896) 426, 427, 41 L. ed. 215.

94 United States v. Realty Co., 163 U. S. (1896) 426, 427, 41 L. ed. 215.

95 "Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises, to pay the debts and provide for the common defence and general welfare of the United States; . . ." United States Constitution, art. I, sec. 8. See the comment in Massachusetts v. Mellon, 262 U. S. (1923) 447, 67 L. ed. 1078.

96 This same attitude will account for the position of the courts on questions of tax exemption. Although exemptions of private enterprises from taxation have been declared void by some of the state courts, Weeks v. Milwaukee, 10 Wis. (1860) 242 (exemption of hotel property); Brewer Brick Co. v. Brewer, 62 Maine (1871) 62 (exemption of factory), others, together with the United States Supreme Court, have indicated that they are valid. In re Opinion of the Court, 58 N. H. (1879) 623; Kersey v. Terre Haute, 161 Ind. (1903) 471, 68 N. E. 1027; Illinois Cent. R. Co. v. Decatur, 147 U. S. (1893) 190, 37 L. ed. 132; New York v. Roberts, 171 U. S. (1898) 658, 43 L. ed. 323.

97 The Fourteenth Amendment undoubtedly limits the power of the state over taxation, Henderson Bridge Co. v. Henderson, 173 U. S. (1899) 592, 614, 43 L. ed. 823, although it has been said that the Fifth Amend-

prises not having the peculiar legal position of common carriers are in general not for public purposes, the question of the power of the legislature to create new "public utilities" at once presents itself. Since the essential characteristic of a public utility is its peculiar legal basis, at first thought there would seem to be no valid reason why the legislature could not change the legal basis of any industry so that it would become a "utility." In fact, the courts of Nebraska and Kansas have held that grist mills were charged with a public purpose on this very ground,[98] and this view has the approval of the United States Supreme Court.[99] It is obvious, however, that if such a rule be extended, it would open the flood-gates to untold legislative abuses. This consideration has led many courts to scrutinize the newly created utilities with great care in order that no irregularity may be found in their organization.[1]

The attitude of the courts toward new public utilities is best illustrated by the cases involving the use of the power of eminent domain to foster the utilization of water power to generate electricity. It is evident that there is a very close relation between this group of cases and the mill act cases, which we have seen were upheld by the courts largely on grounds of custom and tradition.[2] The criticism which had been directed against the courts because of their decisions in the mill act cases had made them very hesitant to extend the rules there laid down.

ment does not limit the taxing power of Congress. Brushaber v. Union Pac. R. Co., 240 U. S. (1916) 1, 60 L. ed. 493.

[98] Harding v. Funk, 8 Kans. (1871) 315; Traver v. Merrick Co., 14 Nebr. (1883) 327, 15 N. W. 690, 45 Am. Rep. 111; State v. Clay County, 20 Nebr. (1886) 452, 30 N. W. 528.

[99] Burlington v. Beasley, 94 U. S. (1876) 310, 24 L. ed. 161; Blair v. Cuming County, 111 U. S. (1884) 363, 28 L. ed. 457; Guernsey v. Burlington, 4 Dill. (1877) 372, 375 (Judge Dillon followed the Kansas rule in this case although he declared he could not approve it).

[1] Sadler v. Langham, 34 Ala. (1859) 311; Loughbridge v. Harris, 42 Ga. (1871) 500; Tyler v. Beacher, 44 Vt. (1871) 648, 8 Am. Rep. 398; Ryerson v. Brown, 35 Mich. (1877) 333, 24 Am. Rep. 564; New York Cent. &c. R. Co. v. Metropolitan Gas-Light Co., 5 Hun (N. Y., 1875) 201; Fergus Falls v. Fergus Falls Hotel Co., 80 Minn. (1900) 165, 83 N. W. 54.

[2] See sec. 187.

Consequently, the first cases involving the validity of expropriation for the benefit of water power companies met a very hostile court.[3]

The first acts giving power companies the right of eminent domain were very poorly drawn and frequently did not reserve to the public the rights which had always been reserved in the case of carriers. Under these conditions, the courts held, the company could not be given the power to condemn land. The law must specifically require that the utility shall serve the public indiscriminately, and if this matter is left to the option of the company it can not be considered as a public service corporation.[4] Furthermore, it is evident that the courts were attempting to construe these statutes very strictly,[5] and if possible to evade the issue of public purpose.[6]

§ 193. In one of the strongest of these early cases, however, it was recognized that the legislature might invest

[3] See the attitude of the justices in Haverford Elec. Light Co. v. Hart, 13 Pa. Co. Ct. (1892) 369. Lamborn v. Bell, 18 Colo. (1893) 346, 32 Pac. 989, is no exception to the rule for power companies were declared utilities in that case only because of the peculiar eminent domain provision in the Colorado constitution which makes all manufacturing plants "public." Compare this attitude with the one of the Maine court toward water works. Riche v. Bar Harbor Water Co., 75 Maine (1883) 91; Hamor v. Bar Harbor Water Co., 78 Maine (1886) 127, 3 Atl. 40.

[4] Avery v. Vermont Elec. Co., 75 Vt. (1903) 235, 54 Atl. 179; Berrien Springs Water Power Co. v. Berrien Circuit Judge, 133 Mich. (1903) 48, 94 N. W. 379; Fallsburg Power & Mfg. Co. v. Alexander, 101 Va. (1903) 98, 43 S. E. 194; Brown v. Gerald, 100 Maine (1905) 351, 61 Atl. 785; State ex rel. v. White River Power Co., 39 Wash. (1905) 648, 82 Pac. 150; State v. Superior Court, 42 Wash. (1906) 660, 85 Pac. 666; Minnesota Canal & Power Co. v. Koochiching Co., 97 Minn. (1906) 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638; State ex rel. v. Superior Court, 50 Wash. (1908) 13, 96 Pac. 519; State ex rel. v. Bancroft, 148 Wis. (1912) 124, 134 N. W. 330, 38 L. R. A. (N. S.) 526; In re Opinion of the Justices, 118 Maine (1919) 503, 106 Atl. 865; State ex rel. v. Superior Court, 133 Wash. (1925) 308, 233 Pac. 651.

[5] As in Southwest Missouri Light Co. v. Scheurich, 174 Mo. (1903) 235, 73 S. W. 496; State ex rel. v. Superior Court, 133 Wash. (1925) 308, 233 Pac. 651.

[6] Goddard v. Chicago &c. R. Co., 104 Ill. App. (1903) 526, 533, affd. 202 Ill. (1903) 362, 66 N. E. 1066; Hollister v. State, 9 Idaho (1903) 8, 71 Pac. 541; Grande Ronde Elec. Co. v. Drake, 46 Ore. (1905) 243 at 248, 78 Pac. 1031; Ingleside Mfg. Co. v. Charleston Light & Water Co., 76 S. Car. (1906) 95, 56 S. E. 664; Stoy v. Indiana Hydraulic Power Co., 166 Ind. (1906) 316, 76 N. E. 1057.

a power company with the rights and duties of a public utility corporation.[7] This viewpoint rapidly spread after 1905 and now is the accepted rule in this group of cases.[8] Within a decade it was well established in both the state and the lower federal tribunals,[9] and was accepted by the

[7] Brown v. Gerald, 100 Maine (1905) 351, 61 Atl. 785.

[8] This change was foreshadowed in Rockingham County Light & Power Co. v. Hobbs, 72 N. H. (1904) 531, 58 Atl. 46, where it was pointed out that individual enterprise without the power of eminent domain could not possibly furnish the power and consequently, if the public interests were to be served it was necessary that companies be given the right of expropriation. In Minnesota it was pointed out that the power generated had peculiar characteristics which enabled it to be distributed in a public fashion. "The nature of electric power is such that it can be indefinitely subdivided and readily transmitted to great distances for use by any number of people for purposes now recognized and innumerable others which the future will certainly disclose." Minnesota Canal & Power Co. v. Koochiching Co., 97 Minn. (1906) 429 at 451, 107 N. W. 405, 5 L. R. A. (N. S.) 638. See also Jones v. North Georgia Elec. Co., 125 Ga. (1906) 618 at 627, 54 S. E. 85.

[9] Shasta Power Co. v. Walker, 149 Fed. (1908) 568; Walker v. Shasta Power Co., 160 Fed. (1908) 856; Washington Water Power Co. v. Waters, 186 Fed. (1910) 572; In re East Canada Creek Elec. Light & Power Co., 49 Misc. (1905) 565, 99 N. Y. S. 109; In re Niagara, Lockport & O. P. Co., 111 App. Div. (1906) 686, 97 N. Y. S. 853; Minnesota Canal & Power Co. v. Pratt, 101 Minn. (1907) 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105; Jacobs v. Clearview Water Supply Co., 220 Pa. (1908) 388, 68 Atl. 870, 21 L. R. A. (N. S.) 410; McMeekin v. Central Carolina Power Co., 80 S. Car. (1908) 512, 61 S. E. 1020; Wisconsin River Imp. Co. v. Pier, 137 Wis. (1908) 325, 118 N. W. 857, 21 L. R. A. (N. S.) 538; McMillan v. Noyes, 75 N. H. (1909) 258, 72 Atl. 759; State v. Superior Court, 52 Wash. (1909) 196, 100 Pac. 317, 21 L. R. A. (N. S.) 448; In re Southern Wis. Power Co., 140 Wis. (1909) 245, 122 N. W. 801; Nolan v. Central Georgia Power Co., 134 Ga. (1910) 201, 67 S. E. 656; Deerfield River Co. v. Wilmington Power &c. Co., 83 Vt. (1910) 548, 77 Atl. 862; Washington Water Power Co. v. Waters, 19 Idaho (1911) 595, 115 Pac. 682; Southern Power Co. v. Walker, 89 S. Car. (1911) 84, 71 S. E. 356; Sioux Falls L. & P. Co. v. Coughran, 27 S. Dak. (1911) 443, 131 N. W. 504; Great Falls Power Co. v. Webb, 123 Tenn. (1911) 584, 133 S. W. 1105; Lucas v. Ashland L. M. & P. Co., 92 Nebr. (1912) 550, 138 N. W. 761; Tuttle v. Jefferson P. & I. Co., 31 Okla. (1912) 710, 122 Pac. 1102; Rutland Railway L. & P. Co. v. Clarendon Power Co., 86 Vt. (1912) 45, 83 Atl. 332, 44 L. R. A. (N. S.) 1204; State v. Superior Court, 70 Wash. (1912) 486, 127 Pac. 104; State v. Superior Court, 71 Wash. (1912) 84, 127 Pac. 591; In re Water Power Cases, 148 Wis. (1912) 124, 134 N. W. 330; Connecticut College for Women v. Calvert, 87 Conn. (1913) 421, 88 Atl. 633, 48 L. R. A. (N. S.) 485; Miller v. Southern Indiana Power Co., 184 Ind. (1916) 370, 111 N. E. 308; Blue Ridge I. R. Co. v. Hendersonville L. & P. Co., 171 N. Car. (1916) 314, 88 S. E. 245; Long Sault Dev. Co. v. Kennedy, 212 N. Y. (1914) 1, 105 N. E. 849; In re Opinion of the Justices, 237 Mass. (1921) 598, 131 N. E. 25; Tarpey v. McClure, 190 Cal. (1923) 593, 213 Pac. 983; In re Blue River Power Co., 112 Nebr. (1924) 500, 199 N. W. 788.

United States Supreme Court.[10] Indeed it seems that the courts now have gone to the other extreme, for in several recent cases they have assumed that the corporation will serve the public equally,[11] and have even upheld statutes where it was evident that the power was to be used by only a very restricted group of people.[12]

The water power cases show up in bold relief the strength of the traditional element in the matter of public purpose. The court is continually beset with two conflicting forces. They desire to uphold legislation wherever it is possible, especially if the power of taxation is involved. At the same time, they tend toward conservatism and are slow to recognize new purposes as public. If it can be shown that the object of the law has customarily been considered a public one, it is probable that the courts will

[10] United States v. Chandler-Dunbar Water Power Co., 229 U. S. (1913) 53, 57 L. ed. 1063. "In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public we should be at a loss to say what is." Justice Holmes, Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U. S. (1916) 30 at 32, 60 L. ed. 507. See also Hendersonville Light & Power Co. v. Blue Ridge Interurban R. Co., 243 U. S. (1917) 563, 61 L. ed. 900; Rockingham County Light & Power Co. v. Philbrick, 79 N. H. (1919) 279, 108 Atl. 813.

[11] Miller v. Southern Indiana Power Co., 184 Ind. (1916) 370 at 373, 111 N. E. 308; West Virginia & Maryland Power Co. v. Raccoon Valley Coal Co., 93 W. Va. (1923) 505, 117 S. E. 891.

[12] The earlier decisions frequently stressed the point that the power was to be used by one or a small group of factories or railroads and hence could not be considered public. Fallsburg Power & Mfg. Co. v. Alexander, 101 Va. (1903) 98, 43 S. E. 194; Avery v. Vermont Elec. Co., 75 Vt. (1903) 235, 54 Atl. 179. A half decade later it was recognized that incidental private use of power would not invalidate the publicity of the purpose if the main object were to serve the public. Walker v. Shasta Power Co., 160 Fed. (1908) 856; Nolan v. Central Georgia P. Co., 134 Ga. (1910) 201, 67 S. E. 656; Hendersonville L. & P. Co. v. Blue Ridge I. R. Co., 243 U. S. (1917) 563, 61 L. ed. 900. This has in turn tended to mean that power plants will be considered public under almost any circumstances. Jacobs v. Clearview Water Supply Co., 220 Pa. (1908) 388, 68 Atl. 870, 21 L. R. A. (N. S.) 410; Washington Water Power Co. v. Waters, 186 Fed. (1910) 572; Webb v. Knox County Transmission Co., 143 Tenn. (1920) 423, 225 S. W. 1046. It would seem very easy to carry this last doctrine to an absurdity.

uphold it regardless of the inherent logic of the situation. Above all, the courts tread cautiously.

§ 194. The courts are not entirely without criteria by which public purpose in matters of business enterprise may be judged. Whatever norms they have, it must be admitted, are for the most part subconscious, but a careful reading of the decisions indicates that they are not nearly as conflicting as they first appear to be. If the industry has been given the legal duties and liabilities of a public utility, it must be assumed to be a public utility.[13] The legislative declaration is given great weight in this connection, and the courts apply with utmost strictness the rule that every presumption must be indulged in to save the law.

Another element which influences the court in this class of cases is whether there is a public necessity for the use of the particular power which is given to the business enterprise. This necessity is by no means the same as "expediency," which is a matter purely in the hands of the legislature for determination.[14] In eminent domain cases

[13] Thus public cemeteries may be given the power of eminent domain. United States v. Gettysburg Elec. R. Co., 160 U. S. (1896) 668, 40 L. ed. 576; Starr Burying Ground Assn. v. North Lane Cemetery Assn., 77 Conn. (1904) 83, 58 Atl. 467; Matter of Lyons Cemetery Assn., 93 App. Div. (1904) 19, 86 N. Y. S. 960; Brown v. Park Cemetery, 78 N. H. (1917) 387, 101 Atl. 34. But those not dedicated to the public use may not. Evergreen Cemetery Assn. v. Beecher, 53 Conn. (1885) 551, 5 Atl. 353; Starr Burying Ground Assn. v. North Lane Cemetery Assn., 77 Conn. (1904) 83, 58 Atl. 467. Likewise, public elevators may condemn a site. Stewart v. Great Northern R. Co., 65 Minn. (1896) 515, 68 N. W. 208; Simmons v. Northern Pac. R. Co., 147 Minn. (1920) 313, 180 N. W. 114. Private elevators may not use eminent domain. Missouri Pac. R. Co. v. Nebraska, 164 U. S. (1896) 403, 41 L. ed. 489.

Some state courts have held that eminent domain may be used to aid mining enterprises. Goldfield Consol. Mill. & Transp. Co. v. Old Sandstorm Annex Gold Min. Co., 38 Nev. (1915) 426, 150 Pac. 313; Marsh Min. &c. Co. v. Inland Empire Co., 30 Idaho (1917) 1, 165 Pac. 1128; Ketcham Coal Co. v. Pleasant Val. Coal Co., 50 Utah (1917) 395, 168 Pac. 86. *Contra:* Sutter County v. Nicols, 152 Cal. (1908) 688, 93 Pac. 872, 15 L. R. A. (N. S.) 616, 14 Ann. Cas. 900. In Idaho lumbering may be aided by this power. Potlatch Lumber Co. v. Peterson, 12 Idaho (1905) 769, 88 Pac. 426, 118 Am. St. 233.

[14] Lewis, Eminent Domain (3rd ed.), secs. 255, 369; C. F. Randolph, Law of Eminent Domain (Boston, 1894), 49-51; T. M. Cooley, Constitutional Limitations (Boston, 1890), p. 663.

it must appear to the satisfaction of the court that the project could not be reasonably expected to be consummated without this power. Before any particular plot of ground can be taken a balance must be struck between the degree of invasion of the rights of the owner and the public necessity which is to be served by the taking.[15] In taxation cases, the question turns on the ability of the enterprise to operate without public aid. If private initiative is amply able to serve the public without subsidy, grants of public money become mere gifts; but if the industry is considered by the legislature an essential one, and if it can not continue to operate without government aid, the grant then becomes a payment for a service actually rendered.[16] There is no reason for public assistance when the public can be as effectively served without it, and so the attitude of the court in the matter of public purpose is reducible to a modified form of *laissez faire* plus the necessity of public user of the industry.

[15] 20 *Corpus Juris*, 629-638.

[16] This is the basis of Fergus Falls v. Fergus Falls Hotel Co., 80 Minn. (1900) 165, 83 N. W. 54, in which the court refused to approve a loan of public money to a private hotel company.

CHAPTER XXIII.

GOVERNMENTAL PURPOSES.

§ 195. There is probably no portion of public law in which so many serious conflicts of opinion are to be found as that which involves the validity of expenditures for alleged governmental purposes. The difficulty is partly due to the conflict between the traditional purposes of government and the ever increasing demand that the scope of state activities be increased, but it is also due to the seeming lack of any satisfactory definite norm by which cases involving expenditures for governmental purposes may be tested. Little question arises regarding appropriations for the administration of justice, the pay of public officers,[1] the cost of public buildings,[2] or even public education in any of its manifold aspects,[3] for these have long been con-

[1] For this purpose an attorney is considered a public officer, and if it is necessary to provide fees to secure adequate defense in capital cases, this is a governmental purpose. People v. Grout, 87 App. Div. (1903) 193, 84 N. Y. S. 87; 177 N. Y. (1904) 587, 70 N. E. 1105.

[2] The courts even go so far as to permit surplus space in public buildings to be rented if the principal object of the building is governmental. Appropriations for the erection of public buildings have been upheld in: Spaulding v. Lowell, 23 Pick. (Mass., 1839) 71; French v. Quincy, 3 Allen (Mass., 1861) 9; White v. Stamford, 37 Conn. (1871) 578; Worden v. New Bedford, 131 Mass. (1881) 23, 41 Am. Rep. 185; Bates v. Bassett, 60 Vt. (1888) 530, 15 Atl. 200, 1 L. R. A. 166; Green v. Jones, 164 Ark. (1924) 118, 261 S. W. 43; Robbins v. Kadyk, 312 Ill. (1924) 290, 143 N. E. 863; Halbruegger v. St. Louis, 302 Mo. (1924) 573, 262 S. W. 379. If the primary object of the building is not governmental the expenditure is void. Brooks v. Brooklyn, 146 Iowa (1910) 136, 124 N. W. 868, 26 L. R. A. (N. S.) 425.

Land for these buildings may be taken by eminent domain. Jamaica v. Denton, 70 N. Y. S. (1895) 837; Norfolk County Commrs. v. Cox, 98 Va. (1900) 270, 36 S. E. 380; Mercer County v. Wolff, 237 Ill. (1908) 74, 86 N. E. 708; Kohl v. United States, 91 U. S. (1875) 367, 23 L. ed. 449 (post office); Chappell v. United States, 160 U. S. (1896) 511, 40 L. ed. 514 (light house).

[3] Williams v. School Dist. No. 6, 33 Vt. (1860) 271; Merrick v. Am-

sidered ordinary expenses of government.[4] Certain charherst, 12 Allen (Mass., 1866) 500; Livingston v. Darlington, 101 U. S. (1879) 407, 25 L. ed. 1015; Board of Trustees v. Lexington, 112 Ky. (1901) 171, 65 S. W. 350 (house of correction); State v. Henderson, 160 Mo. (1901) 190, 60 S. W. 1093; State v. Sayre, 90 Ohio St. (1914) 215, 107 N. E. 512 (law library); Knights v. Treasurer & Receiver Gen., 237 Mass. (1921) 493, 130 N. E. 60.

So also land may be condemned for schools, libraries, or playgrounds in connection with them. Independent School Dist. v. Hewitt, 105 Iowa (1898) 663, 75 N. W. 497 (playground); Laird v. Pittsburg, 205 Pa. (1903) 1, 54 Atl. 324, 61 L. R. A. 332 (library); Wendel v. Board of Educ., 76 N. J. L. (1908) 499, 70 Atl. 152; Lyford v. Laconia, 75 N. H. (1909) 220, 72 Atl. 1085, 22 L. R. A. (N. S.) 1062, 139 Am. St. 680 (library); State v. Superior Court, 69 Wash. (1912) 189, 124 Pac. 484 (playground); Graded School Trustees v. Hinton, 165 N. Car. (1914) 12, 80 S. E. 890; Commonwealth v. Clearview Coal Co., 256 Pa. (1917) 328, 100 Atl. 820; School Board v. Alexander, 126 Va. (1919) 407, 101 S. E. 349; Board of Educ. v. Harper, 191 N. Y. S. (1922) 273; Byfield v. Newton, 247 Mass. (1923) 46, 141 N. E. 658. For the same reason a publicly owned university may condemn land for its use. Connecticut College for Women v. Calvert, 87 Conn. (1913) 421, 88 Atl. 633, 48 L. R. A. (N. S.) 485; Knapp v. State, 125 Minn. (1914) 194, 145 N. W. 967; Rowland v. Mercer County Tract. Co., 90 N. J. L. (1918) 82, 102 Atl. 814; People v. Brooks, 224 Mich. (1923) 45, 194 N. W. 602 (lawyer's club); Cochran v. Cavanaugh, 252 S. W. (Tex. Civ. App., 1923) 284.

It is upon similar grounds that appropriations may be made to celebrate important historical events. Lilly v. Indianapolis, 149 Ind. (1897) 648, 49 N. E. 887; Hill v. East Hampton, 140 Mass. (1886) 381, 4 N. E. 811; Hubbard v. Taunton, 140 Mass. (1886) 467, 5 N. E. 157; Stegmaier v. Goeringer, 218 Pa. St. (1907) 499, 67 Atl. 782, 11 Ann. Cas. 973; Schieffelin v. Hylan, 236 N. Y. (1923) 254, 140 N. E. 689. Appropriations for exhibits at fairs may be sustained on this as well as on other grounds. Tatham v. Philadelphia, 11 Phila. (C. P., 1876) 276; Daggett v. Colgan, 92 Cal. (1891) 53, 28 Pac. 51, 14 L. R. A. 474, 27 Am. St. 95; Downing v. Indiana State Board of Agriculture, 129 Ind. (1891) 443, 28 N. E. 123, 614, 12 L. R. A. 664; Norman v. Kentucky Board of Managers, 93 Ky. (1892) 537, 20 S. W. 901; Shelby County v. Tennessee C. Exposition Co., 96 Tenn. (1896) 653, 36 S. W. 694; State v. Cornell, 53 Nebr. (1898) 556, 74 N. W. 59, 39 L. R. A. 513, 68 Am. St. 629; Minneapolis v. Janney, 86 Minn. (1902) 111, 90 N. W. 312; Kentucky Live Stock Breeders Assn. v. Hagar, 120 Ky. (1905) 125, 85 S. W. 738, 27 Ky. L. 518. A similar basis may account for the fact that payments to agricultural societies are upheld (State v. Robinson, 35 Nebr. (1892) 401, 53 N. W. 213, 17 L. R. A. 383; Carman v. Hickman County, 185 Ky. (1919) 630, 215 S. W. 408; State v. Miller, 104 Nebr. (1920) 838, 178 N. W. 846), while the support of a G. A. R. post has been held unconstitutional. Kingman v. Brockton, 153 Mass. (1891) 255, 26 N. E. 998. If the appropriation is to be made by a municipality, it must, of course, have proper legislative authority for the expenditure. Tash v. Adams, 10 Cush. (Mass., 1852) 252; New London v. Brainard, 22 Conn. (1853) 552; Hood v. Lynn, 1 Allen (Mass., 1861) 103; Eufaula v. McNab, 67 Ala. (1880) 588, 42 Am. Rep. 118; The Liberty Bell, 23 Fed. (1885) 843; Hayes v. Douglas County, 92 Wis. (1896) 429, 65 N. W. 482.

[4] See 20 *Corpus Juris,* 586, 587; 37 Cyc. 720-723; 10 R. C. L. sec. 21; 13 R. C. L. sec. 32.

itable functions such as the care of the insane, the sick, or paupers rest on fully as strong grounds,[5] and expenditures for the care of inebriates have been generally upheld.[6]

In each of these cases, however, the state performs the functions directly and consequently they must be considered as public in the narrowest sense of the term. Greater difficulty arises when the government undertakes to aid private institutions rather than perform these functions itself. Unless the public has some effective means of control over the institutions aided, there is no way in which the expenditures may be protected from waste or misuse. For this reason, the earlier opinions indicated that unless the government was in a position to dictate the objects and method of the expenditure, it would not be upheld.[7] Since 1880 there has been a shift in the attitude of the courts. If there is evidence that the public is protected in any reasonable manner, and if there are no particular provisions in the state Constitution to prevent it, the taxing power may be used to aid private charitable institutions.[8]

[5] Hamden v. New Haven, 91 Conn. (1917) 589, 101 Atl. 11; Beck v. Shawnee County, 105 Kans. (1919) 325, 182 Pac. 397; Manning v. Bruce, 186 Mass. (1904) 282, 71 N. E. 537; Battle v. Willcox, 128 S. Car. (1924) 500, 122 S. E. 516.

[6] Knowlton v. Rock County, 9 Wis. (1859) 410; State v. Cassidy, 22 Minn. (1875) 312, 21 Am. Rep. 765; White v. Inebriates' Home, 141 N. Y. (1894) 123, 35 N. E. 1092; Murray v. Board of County Commrs., 81 Minn. (1900) 359, 84 N. W. 103. But if the payment is to private institutions or individuals the expenditure is void. Wisconsin Keeley Inst. Co. v. Milwaukee County, 95 Wis. (1897) 153, 70 N. W. 68; State ex rel. v. Froelich, 118 Wis. (1903) 129, 94 N. W. 50.

[7] Curtis's Adm'r. v. Whipple, 24 Wis. (1869) 350, 1 Am. Rep. 187; Jenkins v. Andover, 103 Mass. (1869) 94; Hitchcock v. St. Louis, 49 Mo. (1872) 484; St. Mary's Industrial School v. Brown, 45 Md. (1876) 310 (the state in this case could appoint a minority of the directors).

[8] The only cases, in which such grants have been held void, since 1880 have been based upon particular provisions in the state constitutions. Synod of South Dakota v. State, 2 S. Dak. (1891) 366, 50 N. W. 632, 14 L. R. A. 418; Washington Home v. Chicago, 157 Ill. (1895) 414, 41 N. E. 893; Mt. Sinai Hospital v. Hyman, 92 App. Div. (1904) 270, 87 N. Y. S. 276; State v. St. Louis, 216 Mo. (1909) 47, 115 S. W. 534 In a number of cases it was assumed that the public interests were safeguarded. Gerke v. Purcell, 25 Ohio St. (1874) 299; Humphries v. Little Sisters of the Poor, 29 Ohio St. (1876) 201; Hennepin County v. Brotherhood of

This change in attitude was undoubtedly due to the fact that it was practically impossible to distinguish between aid to such institutions and pay given them for caring for public charges. Most of the states lacked facilities for meeting the needs of its dependents and was virtually forced to farm them out to private institutions on a per diem basis. While this method was very unsatisfactory from a sociological point of view, it was obvious that the sum paid for this service could not be considered a gift. Since it was compensation for a service actually rendered in caring for the indigent, its constitutionality could not be questioned.[9] But it is almost impossible to differentiate between this payment and a grant in aid; and the rule which had hitherto been supported by only a few justices, became generally, although not universally, accepted.[10]

Gethsemane, 27 Minn. (1881) 460, 8 N. W. 595, 38 Am. Rep. 298; In re House, 23 Colo. (1896) 87, 46 Pac. 117, 33 L. R. A. 832; Boehm v. Hertz, 182 Ill. (1889) 154, 54 N. E. 973, 48 L. R. A. 575. In Underwood v. Wood, 93 Ky. (1892) 177, 19 S. W. 405, the grant held void was not authorized by the state statute.

[9] Shepherds' Fold v. Mayor of New York, 96 N. Y. (1884) 137; Wisconsin Industrial School v. Clark County, 103 Wis. (1899) 561, 79 N. W. 422; Sargent v. Board of Education of Rochester, 177 N. Y. (1904) 317, 69 N. E. 722. The change in judicial attitude in this respect is best seen by comparing the decisions of the Wisconsin court. Curtis v. Whipple, 24 Wis. (1896) 350; Wisconsin Keeley Inst. Co. v. Milwaukee County, 95 Wis. (1897) 153, 70 N. W. 68 (holding void appropriations to a private institution for the treatment of habitual drunkards); Wisconsin Industrial School v. Clark County, 103 Wis. (1899) 561, 79 N. W. 422 (upholding grants to a private girls' industrial school); State ex rel. v. Bentley, 163 Wis. (1916) 632, 158 N. W. 306. The court attempted to distinguish the Industrial School Case from the Keeley Institute Case on the ground that girls are more under the care of the state than grown men, but this is beside the point as regards the validity of public expenditures through private agencies.

[10] Donohugh's Appeal, 86 Pa. (1878) 306; Henry v. Cohen, 66 Ala. (1880) 382; State ex rel. v. Siebert, 123 Mo. (1894) 424, 24 S. W. 750, 27 S. W. 624; Baltimore v. Keeley Inst., 81 Md. (1895) 106, 31 Atl. 437, 27 L. R. A. 646; People v. New York Soc. for Prevention of Cruelty to Children, 161 N. Y. (1900) 233, 55 N. E. 1063; People v. Fitch, 154 N. Y. (1897) 14, 47 N. E. 983; Hagar v. Children's Home Soc., 119 Ky. (1904) 235, 83 S. W. 605; State ex rel. v. Bentley, 163 Wis. (1916) 632, 158 N. W. 306.

It is under this rule that the courts uphold payments to pension funds for firemen, for these are frequently under private control. Firemen's Benevolent Assn. v. Lounsberry, 21 Ill. (1859) 511, 74 Am. Dec. 115; Trustees of Exempt Firemen's Fund v. Roome, 93 N. Y. (Ct. of Appeals, 1883) 313; Henderson v. London Ins. Co., 135 Ind. (1893) 23, 34 N. E. 565;

§ 196. Although the tendency is undoubtedly to ignore the agency through which the money is spent and to consider only the purpose of the tax, it does not follow that grants to all private institutions of charity are valid. An institution which is purely eleemosynary and does not operate for profit may be aided by public funds,[11] unless it discriminates among those it will serve. When its benefits are restricted to members of certain religious or fraternal organizations, the courts have held that it is not a public institution and can not be given state aid.[12] But if no rule of the institution debars the public from its services, the taxing power may be used to aid it[13] even though preference is given to certain classes of persons,[14] or a fee is charged for special services rendered.[15]

A still more difficult question has arisen in connection with direct public doles to individuals. Payments to private institutions may be considered as compensation for service rendered, but when the grant is given to the individual directly, it can hardly be distinguished from a direct

Phoenix Fire Assur. Co. v. Montgomery Fire Dept., 117 Ala. (1897) 631, 23 So. 843. The Pennsylvania court has reversed itself on this question. In Philadelphia Assn. v. Wood, 39 Pa. St. (1861) 73, taxes for a fund under private control were held void. Subsequent cases have held them valid. Commonwealth ex rel. v. Walton, 182 Pa. St. (1897) 373, 38 Atl. 790; Commonwealth ex rel. v. Barker, 211 Pa. St. (1905) 610, 61 Atl. 253.

[11] Gerke v. Purcell, 25 Ohio St. (1874) 229; Hagar v. Children's Home Soc., 119 Ky. (1904) 235, 83 S. W. 605, can be distinguished from Wisconsin Keeley Inst. Co. v. Milwaukee County, 95 Wis. (1897) 153, 70 N. W. 68, on this basis. See also Fox v. Mohawk & Hudson River Humane Soc., 165 N. Y. (1901) 517, 59 N. E. 353.

[12] Jenkins v. Andover, 103 Mass. (1869) 94; Philadelphia v. Masonic Home, 160 Pa. St. (1894) 572, 28 Atl. 954; Connecticut College for Women v. Calvert, 87 Conn. (1913) 421, 88 Atl. 633, 48 L. R. A. (N. S.) 485.

[13] Gerke v. Purcell, 25 Ohio St. (1874) 229; Humphries v. Little Sisters of the Poor, 29 Ohio St. (1876) 201; Donohugh's Appeal, 86 Pa. (1878) 306; Hennepin County v. Brotherhood of Gethsemane, 27 Minn. (1881) 460, 8 N. W. 595, 38 Am. Rep. 298; White v. Inebriates' Home for Kings County, 141 N. Y. (1894) 123, 35 N. E. 1092; People v. Fitch, 154 N. Y. (1897) 14, 47 N. E. 983; Boehm v. Hertz, 182 Ill. (1899) 154, 54 N. E. 983, 48 L. R. A. 575; Hagar v. Children's Home Soc., 119 Ky. (1904) 235, 83 S. W. 605; State ex rel. v. Bentley, 163 Wis. (1916) 632, 158 N. W. 306.

[14] Burd Orphan Asylum v. School Dist. of Upper Darby, 90 Pa. St. (1879) 21.

[15] Gerke v. Purcell, 25 Ohio St. (1874) 229, Donohugh's Appeal, 86 Pa. (1878) 306; People v. Fitch, 154 N. Y. (1897) 14, 47 N. E. 983.

gift. When the recipient is destitute, however, a direct gift is little more than is done when an institution gives food to the starving. Certainly the state can administer charity itself without the intermediary of an institution if it prefers. As long as the purpose is a public one, the method used to accomplish it rests with the legislature. This rule has been so generally accepted in cases involving actual poverty, that no direct case seems to have arisen under it.

If direct grants are valid in order to accomplish one public purpose, it is difficult to see any valid reason why they should not be constitutional in any case where the purpose is a legitimate one and where the amount given was reasonable in view of the object of the appropriation. The Missouri court, however, has held that the legislature could not give scholarships to needy students at the state university,[16] and in Ohio an annuity of twenty-five dollars per quarter to each blind person was held void.[17] In both of these cases the court contended that the object of the concept of public purpose was to prevent paternalism, and the incidental public benefit was not enough to justify the appropriation. If it is paternalistic to support the blind and to promote equality of opportunity in education, our whole government must be considered paternalistic, and the argument of the courts proves too much. But since these purposes are well recognized as traditionally belonging to the sphere of government, the purpose is surely public regardless of the means used to accomplish it.

[16] State v. Switzler, 143 Mo. (1898) 287, 45 S. W. 245, 40 L. R. A. 280, 65 Am. St. 653. The case involved the validity of the inheritance tax and the act was declared void partly on the ground that the classification was faulty, and partly because of the lack of a public purpose in the expenditure. See also Simmons Med. Co. v. Ziegenhein, 145 Mo. (1898) 369, 47 S. W. 10. Subsequently legislation on the same subject which eliminated the objectionable classification and ordered the money to be paid to the university itself was upheld. State v. Henderson, 160 Mo. (1901) 190, 60 S. W. 1093.

[17] Lucas County v. State, 75 Ohio St. (1906) 114, 78 N. E. 955. But see Davies v. State, 27 Ohio Cir. Ct. (1905) 593, in which aid to worthy blind persons was upheld.

§ 197. Most of the cases involving gratuities or loans of state credit to private individuals arose out of sudden emergencies or great calamities. When a large section of a city has been destroyed by fire, it is but natural to want to rebuild it as quickly as possible, and in at least two instances the legislature has attempted to use the public funds for this purpose. In both cases the expenditure was held void for lack of a public purpose.[18] Any advantage which the public might derive was purely incidental and unless the whole community could be said to be benefited the tax was sheer confiscation. Although the matter might be stated collectively, it was obvious that the real purpose of the grants in each case was the improvement of the economic position of certain individuals. The public would have had neither an interest in, nor any control over the houses which were to be erected. In neither opinion was there any mention of due process of law, but the decision rested on grounds which are now considered part of that concept.[19]

[18] Lowell v. Boston, 111 Mass. (1873) 454, 15 Am. Rep. 39; Feldman v. Charleston, 23 S. Car. (1884) 57, 55 Am. Rep. 6. In 1917 the Constitutional Convention of Massachusetts adopted an amendment by a vote of 275-25 which modified the rule of the decision in Lowell v. Boston. This amendment was overwhelmingly ratified by the people. Scott v. Frazier, 258 Fed. (1919) 669 at 677, 678. The main purpose of this amendment, however, was to permit the state to engage in public trading. Debates in the Massachusetts Constitutional Convention, 1917, 1918 (Boston, 1919), Vol. I, 641-850. The case of Lowell v. Boston was only discussed in this connection incidentally. *Ibid.*, p. 839. The amendment read: "The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency or distress, of a sufficient supply of food and other common necessaries of life and the providing of shelter, are public functions, and the commonwealth and the cities and towns therein may take and may provide the same for their inhabitants in such manner as the general court shall determine" Massachusetts Constitution, 1917, art. XLVII (rearrangement art. 69.)

[19] "The power to levy taxes is essential to the existence of any government, but it is not, and from the very nature of the subject can not be an unlimited power. Even in the absence of any express constitutional restriction it can not be said that the power of the legislature to impose taxes is unlimited, for that would necessarily imply that the legislature, under the guise of imposing taxes might exercise the power of confiscation. Hence it seems to be universally conceded, even by those who are disposed to enlarge the taxing power of the legislature to its greatest extent, that a law authorizing taxation for any other than a public purpose is void." Feldman v. Charleston, 23 S. Car. (1884) 57 at 62, 55 Am. Rep. 6.

It sometimes happens that a catastrophe gives rise to a situation in which direct aid may be necessary in order to carry out what is a recognized public purpose. After a city has been destroyed by a cyclone, it is certainly the duty of the government to clear the debris and bury the dead. Public health and safety can only be safeguarded when this is done.[20] A closer question is raised by laws appropriating money to buy seed for farmers in periods of crop failures. It is recognized that the relief of poverty is a public function, but in the earliest case involving the emergency seed laws, the Supreme Court of Kansas declared that this did not embrace preventative relief.[21] A similar law was upheld in Nebraska,[22] and the doctrine of the earlier case was all but repudiated subsequently in Kansas.[23] It must be recognized that there is danger that such a wide power as that of providing for preventative relief may be abused, but the remedy in those cases would seem to lie with the legislature and not with the courts. If the relief of poverty is a public purpose, no legal reason

[20] State ex rel. v. Davidson, 114 Wis. (1902) 563, 88 N. W. 596, 90 N. W. 1067. In Patty v. Colgan, 97 Cal. (1893) 251, 31 Pac. 1133, 18 L. R. A. 744, the court held that a tax to aid flood sufferers was void.

[21] State v. Osawkee Township, 14 Kans. (1875) 418, 19 Am. Rep. 99. Justice Brewer argued that although relief of the poor was a valid public purpose, it only authorized aid to actual paupers. Preventative relief was unconstitutional for it was really an appropriation of money for the benefit of a special class. Even though the payments were only loans, they were equally obnoxious, and if the law in this case were upheld, no end of evils might flow from the decision. A similar law was held void in Deering & Co. v. Peterson, 75 Minn. (1898) 118, 77 N. W. 568.

[22] State v. Nelson County, 1 N. Dak. (1890) 88, 45 N. W. 33, 8 L. R. A. 283, 26 Am. St. 609. The court based its decision squarely on the ground that preventative legislation was as constitutional as remedial; both being for a public purpose.

[23] The earlier case was deliberately disregarded in two instances when the legislature gave relief to drought-stricken farmers. See Laws of 1891, chs. 42, 120, 199; Laws of 1895, ch. 242. These violations of the constitution were winked at by the court in each instance. See Treadwell v. Beebe, 107 Kans. (1919) 31 at 38, 190 Pac. 708. In Beck v. Shawnee County, 105 Kans. (1919) 325 at 329, 330, 182 Pac. 397, the court upheld an act providing for "general welfare" institutions in connection with the county farms which could aid unfortunate people before they reached the destitution line. The court in this case rested its decision upon the validity of preventative relief. See also Hamden v. New Haven, 91 Conn. (1917) 589, 101 Atl. 11.

can be given which would limit the legislature to the sociologically ineffective method of doles through the poorhouse.[24]

§ 198. Although it is still a fiction in Anglo-Saxon public law that the state can do no wrong, many of the states as well as the United States government have recognized the necessity of providing some method by which it might be required to pay its normal obligations. It has long been recognized that the legislature might not only settle legal claims,[25] but those of a moral or equitable character as well.[26] A moral obligation may be described as one which an honorable man ought to meet regardless of whether it is legally binding or not.[27] The test is if a man of average conscientiousness would consider himself morally bound to make the payment under the same circumstances.

In these general terms the rule seems simple enough, but the difficulty comes in its application. The government is under obligation to a public officer who has incurred expenses while in office which were not warranted by law, but from which the public has derived some benefit. The obligation is especially strong if equipment has been purchased for governmental use;[28] but the public may

[24] Upon the same principle laws appropriating money for medical treatment in time of epidemic have been upheld. Solomon v. Farver, 52 Ga. (1874) 405; Thomas v. Mason, 39 W. Va. (1894) 526, 20 S. E. 580. Preventative measures have been upheld when they were enacted to protect the public health. Jacobson v. Massachusetts, 197 U. S. (1905) 11, 49 L. ed. 643; Viemeister v. White, 179 N. Y. (1904) 235, 72 N. E. 97. The preventative value of isolation hospitals for contagious diseases was considered by the court as a sufficient reason for the use of eminent domain for such an institution. Manning v. Bruce, 186 Mass. (1904) 282, 71 N. E. 537.

[25] State v. Hackmann, 280 Mo. (1920) 686, 218 S. W. 318; Sandel v. State, 115 S. Car. (1920) 168, 104 S. E. 567.

[26] Some of the earlier cases are: Bright v. Chenango County, 18 Johns. (N. Y., 1820) 242; Powell v. Newburgh, 19 Johns. (N. Y., 1822) 284; Nelson v. Milford, 7 Pick. (Mass., 1828) 18; Baker v. Windham, 13 Maine (1836) 74; Bancroft v. Lynnfield, 18 Pick. (Mass., 1836) 566; Babbitt v. Savoy, 3 Cush. (Mass., 1849) 530; Emerson v. Hall, 13 Pet. (U. S., 1839) 409, 10 L. ed. 223; Andrews v. United States, 2 Story (1842) 202.

[27] Justice Rumsey defined a moral obligation as "one which a person owes and which he ought to perform, but which he is not legally bound to fulfill." In re Straus, 44 App. Div. (1899) 425 at 429, 61 N. Y. S. 37.

[28] Bright v. Chenango County, 18 Johns. (N. Y., 1820) 242; Babbitt v. Savoy, 3 Cush. (Mass., 1849) 530; Hadsell v. Hancock, 3 Gray (Mass.,

also make retrospective compensation for services from which it has benefited.[29] The public always has an interest in seeing that the law is enforced and that public officers do their duty promptly and well. Therefore, damages incurred in the *bona fide* enforcement of the law in good faith may be assumed by the government.[30] Thus when an officer has acted under a law which has subsequently been declared void, the courts hold that he may be reimbursed for any damages for which he may be liable.[31]

1855) 526; Brown v. Mayor of New York, 63 N. Y. (1875) 239; Wrought Iron Bridge Co. v. Attica, 119 N. Y. (1890) 204, 23 N. E. 542; People v. Pendergast, 144 App. Div. (1911) 308, 128 N. Y. S. 1082; Gillan v. Gillan, 55 Pa. St. (1867) 430 (payment for property burned by confederate soldiers is valid); McCalmont v. Allegheny County, 29 Pa. St. (1857) 417; People ex rel. v. Kelly, 76 N. Y. (1879) 475, 5 Abb. N. C. 383.

[29] Johnson v. Colburn, 36 Vt. (1864) 693; Lewis v. Hudson County, 37 N. J. L. (1874) 254; Atchison v. Lucas, 83 Ky. (1885) 451, 7 Ky. L. 424; Fuller v. Morrison, 36 Minn. (1886) 309, 30 N. W. 824; Harris v. Chickasaw County, 77 Iowa (1889) 345, 42 N. W. 313; People ex rel. v. Grout, 44 Misc. (1904) 526, 90 N. Y. S. 122; Gaynor v. Port Chester, 174 App. Div. (1916) 122, 160 N. Y. S. 978; Munro v. State, 223 N. Y. (1918) 208, 119 N. E. 444; Cayuga County v. State, 153 N. Y. (1897) 279, 47 N. E. 288; Emerson v. Hall, 13 Pet. (U. S., 1839) 409, 10 L. ed. 223; Andrews v. United States, 2 Story (1842) 202; United States v. Flanders, 112 U. S. (1884) 88, 28 L. ed. 630; United States v. Stowe, 19 Fed. (1884) 807; United States v. Price, 116 U. S. (1885) 43, 29 L. ed. 541; United States v. Smith, 35 Fed. (1888) 490.

Perhaps the best example of a moral obligation of this nature is in appropriations to pay the expenses of a law suit which was begun at the request of the town before the costs could be voted. Baker v. Windham, 13 Maine (1836) 74; Bancroft v. Lynnfield, 18 Pick. (Mass., 1836) 566; Guilford v. Chenango County, 13 N. Y. (1855) 143; Lawrence v. McAlvin, 109 Mass. (1872) 211; Nelson v. Milford, 7 Pick. (Mass., 1828) 18 (reimbursement of money paid to prevent suit against the town is valid). Even if the town had not ordered the suit but will receive pecuniary benefit from it, the tax has been upheld. Briggs v. Whipple, 6 Vt. (1834) 95; Bradley v. Hammonton, 38 N. J. L. (1876) 430, 20 Am. Rep. 404.

But if the act ordered was illegal or *ultra vires*, it is presumed not to be for the public interest and there is no moral obligation. Vincent v. Inhabitants of Nantucket, 12 Cush. (Mass., 1853) 103; Osgood v. Conway, 67 N. H. (1891) 100, 36 Atl. 608.

[30] Briggs v. Whipple, 6 Vt. (1834) 95; Fuller v. Groton, 11 Gray (Mass., 1858) 340; Sherman v. Carr, 8 R. I. (1867) 431; Bradley v. Hammonton, 38 N. J. L. (1876) 430, 20 Am. Rep. 404; Cullen v. Carthage, 103 Ind. (1885) 196, 2 N. E. 571; Barnert v. Paterson, 48 N. J. L. (1886) 395; 6 Atl. 15; State ex rel. v. St. Louis, 174 Mo. (1903) 125, 73 S. W. 623; Hixon v. Sharon, 190 Mass. (1905) 347, 76 N. E. 909; Moorhead v. Murphy, 94 Minn. (1905) 123, 102 N. W. 219, 63 L. R. A. 400; Leonard v. Middleborough, 198 Mass. (1908) 221, 84 N. E. 323.

[31] People ex rel. v. Burr, 13 Cal. (1859) 343; United States v. Realty Co., 163 U. S. (1896) 427, 41 L. ed. 215; Atchison v. Lucas, 83 Ky. (1885)

Upon the same principles, if the obligation would be legal but for some technical bar, it is said to be a moral one which may be met by taxation.[32]

§ 199. The individual state Constitutions differ widely in their restrictions on public expenditures,[33] and therefore some courts are much stricter than others in interpreting what is a moral obligation than others. In Ohio an officer may be repaid when public money has been stolen without his fault,[34] and in Massachusetts a payment of damages due to loss of business, when a physician's office was condemned by eminent domain, has been upheld.[35] The United States Supreme Court seems to have taken the most liberal attitude of all and has even declared that the congressional determination of public purpose is conclusive on the courts.[36] Other courts have been much stricter.[37]

451, 7 Ky. L. 424; Cole v. State, 102 N. Y. (1886) 48, 6 N. E. 277; Miller v. Dunn, 72 Cal. (1887) 462, 14 Pac. 27; People ex rel. v. Coler, 166 N. Y. (1901) 1, 59 N. E. 716; Guthrie National Bank v. Guthrie, 173 U. S. (1899) 528, 43 L. ed. 796. Although a city can be forced to repay money which an officer has paid under an unconstitutional law, it can not force a double payment of it because there is no public purpose. Thus, when the *de facto* officer has been paid the salary, the state can not force the city to reimburse the *de jure* officer as well. Stemmler v. Mayor of New York, 179 N. Y. (1904) 473, 72 N. E. 581. See also Matter of Greene, 55 App. Div. (1900) 475, 166 N. Y. (1901) 485, 60 N. E. 183; State v. Houser, 125 Wis. (1905) 256, 104 N. W. 77.

[32] New Orleans v. Clark, 95 U. S. (1877) 644, 24 L. ed. 521; Mayor of New York v. Tenth National Bank, 111 N. Y. (1888) 446, 18 N. E. 618 (debt outlawed by the Statute of Limitations); Matter of Greene, 55 App. Div. (1901) 475, 166 N. Y. 495, 60 N. E. 183.

[33] See sec. 165.

[34] Board of Education v. McLansborough, 36 Ohio St. (1880) 227, 38 Am. Rep. 582. This has been held void in Mercer v. Floyd, 24 Misc. 164, 53 N. Y. S. (1898) 433; Bristol v. Johnson, 34 Mich. (1876) 123.

[35] Earle v. Commonwealth, 180 Mass. (1902) 579, 63 N. E. 10.

[36] United States v. Jordan, 113 U. S. (1885) 418, 28 L. ed. 1013; United States v. Price, 116 U. S. (1885) 43, 29 L. ed. 541 (if Congress determines the amount which is due, the court will not question its accuracy); Williams v. Heard, 140 U. S. (1891) 529, 35 L. ed. 550 (Congress may pay claims although an international commission had refused to recognize their validity); United States v. Flanders, 112 U. S. (1884) 88, 28 L. ed. 630 (collector of revenue may be paid from the date of his appointment rather than from the date of taking office). The California court has also declared that the legislative determination of the public purpose is conclusive in regard to moral obligations. People v. Burr, 13 Cal. (1859) 343; Stevenson v. Colgan, 91 Cal. (1891) 649, 27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. 230.

[37] People ex rel. v. Supervisors of Onondago, 16 Mich. (1867) 254;

The rule adopted by the New York courts seems on the whole to be the most satisfactory. If the individual has sustained a loss through no fault of his own, and if the state has reaped a material advantage either in services or goods at his expense due to the technical defects of the laws, the court will uphold the appropriation. If these features of a moral obligation are not present the grant becomes nothing but a gratuity and will be declared void by the court.[38] This rule has been frequently applied in New York, particularly in those cases in which the cities have attempted to assist an officer in defending himself from charges growing out of prosecutions for misconduct

Gregory v. Bridgeport, 41 Conn. (1874) 76, 19 Am. Rep. 458; Bristol v. Johnson, 34 Mich. (1876) 123; Castner v. Minneapolis, 92 Minn. (1904) 84, 99 N. W. 361; Clough v. Verrette, 79 N. H. (1920) 356, 109 Atl. 78. The California court has even gone so far as to declare that a state can not give compensation to its own employees who have been injured. Bourn v. Hart, 93 Cal. (1892) 321, 28 Pac. 951. The New York court has held to the contrary. Munro v. State, 223 N. Y. (1918) 208, 119 N. E. 444.

[38] "The distinction between the gratuity which the constitution now forbids and the meritorious claim which it permits municipal bodies to satisfy, notwithstanding judgment adverse to the claimant, is apparent. Where such final judgment is upon the merits, for the legislature to vacate or disregard it and direct the levy of a tax to pay it, either without a new trial or with judgment upon it, would be the bestowal of a gratuity. But where such judgment is not upon the merits, but because of some defect in the authority of the officers to bind the municipal body for which they assume to act, and thus in good conscience is not decisive against the justice of the claim, the legislature may, in order that justice shall prevail, direct its re-examination and determination, and, if found to be just, direct that it be provided for by taxation. The limitations which the law wisely imposes upon the powers of public officers and their methods of exercising them may sometimes result in vesting in the municipal body, without any fault of the individual, his money or labor or their products beyond remedy or recall, except by special legislative action. The legislature may ratify what it might originally have authorized, and it seems to be right that it should have the power to relieve against the special injustice which may sometimes result from the limitations it has imposed upon the authority of the officers which it has empowered with the administration of its municipal creations. Whether in a given case the legislature has kept within its power or has exceeded it, is, of course, a judicial question." Matter of Green, 166 N. Y. (1901) 485 at 494, 495, 60 N. E. 183.

Justice Field declared, "The power of the legislature to require the payment of a claim for which an equivalent has been received, and from the payment of which the city can only escape on technical grounds, would seem clear." New Orleans v. Clark, 95 U. S. (1877) 644 at 653, 24 L. ed. 521

in office.[39] It would also account for many of the cases in which the courts of other states have declared there was no moral obligation;[40] but there are some cases which can not be accounted for by this means.[41]

The same principles are applicable to the question of the power of the state to provide for increased compensation. When the increases can not be construed as being for the benefit of the public, it has generally been held to be a mere gift. For this reason an increase in the interest rate on state bonds has been held void,[42] and an increase in the consideration of a contract is valid only when it will result in greater efficiency.[43] But a bonus to a fire com-

[39] People ex rel. v. Lawrence, 6 Hill (N. Y., 1843) 244; Halstead v. Mayor of New York, 3 Const. (N. Y., 1850) 430; Matter of Labrake, 60 N. Y. S. (1899) 571; Matter of Jensen, 44 App. Div. (N. Y., 1899) 509, 59 N. Y. S. 653; Matter of Fallon, 28 Misc. (1899) 748, 59 N. Y. S. 849; Matter of Straus, 44 App. Div. (1899) 425, 61 N. Y. S. 37; Matter of Greene, 166 N. Y. (1901) 485, 60 N. E. 183; Chapman v. New York, 168 N. Y. (1901) 80, 61 N. E. 108. See also Roberts v. State, 160 N. Y. (1899) 217, 54 N. E. 678 (can not pay damages to pardoned convict who has not established his innocence).

[40] Merrill v. Plainfield, 45 N. H. (1883) 126; Flood v. Leahy, 183 Mass. (1903) 232, 66 N. E. 787; Castner v. Minneapolis, 92 Minn. (1904) 84, 99 N. W. 361; Clough v. Verrette, 79 N. H. (1920) 356, 109 Atl. 78.

[41] People ex rel. v. Supervisors of Onondaga, 16 Mich. (1867) 254; Wilkinson v. Cheatham, 43 Ga. (1871) 258 (can tax to compensate property owners for depreciation due to the removal of the county seat); Gregory v. Bridgeport, 41 Conn. (1874) 76, 19 Am. Rep. 458 (can not reimburse for damages due to enforcement of optional ordinance for the public only has an interest in compulsory laws); Thorndike v. Camden, 82 Maine (1899) 39, 19 Atl. 95, 7 L. R. A. 463 (can not reimburse tax collector for a bad note taken in the payment of taxes). Lycoming v. Union, 15 Pa. St. (1850) 166, 53 Am. Dec. 575, really involves the power of the legislature to distribute governmental expenses among the counties rather than the power to pay a moral obligation, although the court took occasion to declare that due process does not prevent such payment.

The adjustment of treaty claims stands on a different basis as far as the Federal government is concerned. United States v. Ferreira, 13 How. (U. S., 1851) 48, 14 L. ed. 45; Williams v. Heard, 140 U. S. (1891) 529, 35 L. ed. 550; Blagge v. Balch, 162 U. S. (1895) 439, 40 L. ed. 1032.

[42] State v. Foley, 30 Minn. (1883) 350, 15 N. W. 375. But if there is an equitable consideration involved in the interest rate, it may be met. Coles v. Washington, 35 Minn. (1886) 124 at 129, 27 N. W. 497; Fuller v. Morrison, 36 Minn. (1886) 309, 30 N. W. 824.

[43] Such an increase was upheld in Friend v. Gilbert, 108 Mass. (1871) 408, but it was declared void in Anderson v. Hill, 54 Mich. (1884) 477, 20 N. W. 549. In the former case the court was impressed with the faithful service which the contractor had rendered, an element which seems to have

pany having a certain standard of efficiency was upheld because it would be a spur to greater effort.[44]

When an employee is injured in the public service, ordinary humanity would dictate that the state should provide a pension to mitigate the hardship. Many forms of public service are extra-hazardous, and unless employees are assured of a reasonable pension, it would be difficult to fill these positions with desirable men. Furthermore, if the state can require that private employers provide accident compensation,[45] there is no reason why it can not make payments to its own workers who are injured.[46] If there is a public purpose in such payments, it can hardly be objected that they are void because they are made after the service is performed. The mere fact that the law is

been lacking in the second case, and so the court held it a mere gratuity and a violation of due process.

[44] Cutting v. Taylor, 3 S. Dak. (1892) 11, 51 N. W. 949, 15 L. R. A. 691; People ex rel. v. Grout, 79 App. Div. (1903) 61, 79 N. Y. S. 1027.

[45] These acts have been invariably upheld by the United States Supreme Court. New York Cent. R. Co. v. White, 243 U. S. (1917) 188, 61 L. ed. 667; Hawkins v. Bleakey, 243 U. S. (1917) 210, 61 L. ed. 678; Mountain Timber Co. v. Washington, 243 U. S. (1917) 219, 61 L. ed. 685; Middleton v. Texas P. &c. Co., 249 U. S. (1919) 152, 63 L. ed. 527; Arizona Employers' Liability Cases, 250 U. S. (1919) 400, 63 L. ed. 1058; Thornton v. Duffy, 254 U. S. (1920) 361, 65 L. ed. 304; Lower Vein Coal Co. v. Industrial Board, 255 U. S. (1921) 144, 65 L. ed. 555; Madera Sugar Pine Co. v. Industrial Acc. Commn., 262 U. S. (1923) 499, 67 L. ed. 1092; Ward v. Krinsky, 259 U. S. (1922) 503, 66 L. ed. 1033; New York Cent. R. Co. v. Bianc, 250 U. S. (1919) 596, 63 L. ed. 1161; Bowersock v. Smith, 243 U. S. (1917) 29, 61 L. ed. 572.

[46] Fire Department v. Noble, 3 E. D. Smith (N. Y., 1854) 440; Fire Department v. Wright, 3 E. D. Smith (N. Y., 1854) 453; Firemen's Benev. Assn. v. Lounsberry, 21 Ill. (1859) 511, 74 Am. Dec. 115; Fire Department of Milwaukee v. Helfenstein, 16 Wis. (1862) 136; Trustees of Exempt Firemen's Fund v. Roome, 93 N. Y. (Ct. of Appeals) (1883) 313; Henderson v. London Ins. Co., 135 Ind. (1893) 23, 34 N. E. 565; Phoenix Fire Assur. Co. v. Montgomery Fire Department, 117 Ala. (1897) 631, 23 So. 843; Cobbs v. Home Ins. Co., 91 So. (Ala. App., 1922) 627. An early Pennsylvania case held firemen's pension funds invalid (Philadelphia Association v. Wood, 39 Pa. St. (1861) 73), but this has been very materially limited (Weber v. Reinhard, 73 Pa. St. (1873) 370, 13 Am. Rep. 747), if not overruled by the more recent decisions. Commonwealth ex rel. v. Walton, 182 Pa. St. (1897) 373, 38 Atl. 790; Commonwealth ex rel. v. Barker, 211 Pa. St. (1905) 610, 61 Atl. 253.

Similar considerations may be urged to justify a pension for dependents of employees killed in the public service. Opinion of the Justices, 175 Mass. (1900) 599, 57 N. E. 675; State ex rel. v. Caster, 30 Wyo. (1903) 22, 215 Pac. 477.

retroactive does not affect the publicity of its purpose, and it is within the power of the legislature to determine the manner in which the public policy is to be carried out.[47] Retirement pensions rest upon slightly different grounds, for there are obvious and direct benefits to the public service growing out of the fact that it is frequently relieved of senile individuals by pensioning them.[48]

§ 200. The question of a bonus to soldiers has been a perennial one in the United States, the earliest decisions on the question going back as far as 1790.[49] But the question did not assume any great constitutional importance until during the Civil War. Many towns undertook to buy exemption from the draft by offering a bonus to any who would enlist to its credit. This was little more than a

[47] Even though the pension is granted after the service has been performed and is retroactive in its effect, it makes the service more attractive and consequently the public derives a benefit. "An appropriation of public money to be constitutional must be for some use or object which, directly or indirectly, in some degree or manner will materially aid in the proper functioning of some governmental agency, and in so doing will serve a public purpose." P. J. Smith, Mackey v. Reeves, 42 S. Dak. (1919) 340 at 348, 175 N. W. 359 (upholding a pension for injured militiamen). See also Woodall v. Darst, 71 W. Va. (1912) 350, 77 S. E. 264, 80 S. E. 367; State ex rel. v. Caster, 30 Wyo. (1923) 22, 215 Pac. 477. In Munro v. State, 223 N. Y. (1918) 208, 119 N. E. 444, the court pointed out that the legislature could compensate individuals for property put at the disposal of the state and it certainly could compensate for personal safety.

Two courts have held to the contrary. San Francisco v. Liverpool Ins. Co., 74 Cal. (1887) 113, 15 Pac. 380; Bourn v. Hart, 93 Cal. (1892) 321, 28 Pac. 951; State v. Ziegenheim, 144 Mo. (1898) 283, 45 S. W. 1099; State v. Kimmel, 256 Mo. (1914) 611, 165 S. W. 1067. See also Whittaker v. Salem, 216 Mass. (1914) 483, 104 N. E. 359.

Massachusetts and New York have held retroactive pensions to dependents void. Opinion of the Justices, 175 Mass. (1900) 599, 57 N. E. 675; Mahon v. Board of Educ., 171 N. Y. (1902) 263, 63 N. E. 1107; People ex rel. v. Partridge, 172 N. Y. (1902) 305, 65 N. E. 164. It is possible that the New York court might hold differently now in view of Munro v. State, 223 N. Y. (1918) 208, 119 N. E. 444.

[48] Wright v. Craig, 202 App. Div. (1922) 684, 195 N. Y. S. 391; Bowler v. Nagel, 228 Mich. (1924) 434, 200 N. W. 258. On the necessity of a retirement pension scheme in the public service see Lewis Meriam, Principles Governing the Retirement of Public Employees (N. Y., 1918), esp. pp. 3-17, 382-385. But a teachers' pension scheme was held void in Hibbard v. State, 65 Ohio St. (1901) 574, 64 N. E. 109, 58 L. R. A. 654.

See also F. J. Goodnow, "Constitutionality of Old Age Pensions," Amer. Pol. Science Review, Vol. V (1911), pp. 194-212.

[49] Hitchcock v. Litchfield, 1 Root (Conn., 1790) 206.

payment to relieve the community of a common burden and was invariably upheld,[50] even though the money was to go into the hands of a draftee[51] or his family.[52] It was another matter when the bonus was given after the service had been performed. Even in this case soldiers' bounties have been upheld on the ground that they promote patriotism and consequently will foster enlistments in case of future war,[53] although in some states they have been held void because of the indirectness of the benefit to the public.[54]

[50] Lowell v. Oliver, 8 Allen (Mass., 1864) 247; Cass Township v. Dillon, 16 Ohio St. (1864) 38; Coffman v. Keightly, 24 Ind. (1865) 509; Board of Commissioners v. Bearss, 25 Ind. (1865) 110; Barbour v. Camden, 51 Maine (1865) 608; Speer v. School Directors of Blairsville, 50 Pa. St. (1865) 150; Brodhead v. Milwaukee, 19 Wis. (1865) 624, 88 Am. Dec. 711 (upheld on the ground that because of the bounty those will go who can be most easily spared); Waldo v. Portland, 33 Conn. (1866) 363; Taylor v. Thompson, 42 Ill. (1866) 8; Winchester v. Corinna, 55 Maine (1866) 9; Comer v. Folsom, 13 Minn. (1868) 219; State v. Richland, 20 Ohio St. (1870) 362; Middleton v. Mullica, 112 U. S. (1884) 433, 28 L. ed. 785. The argument of the Kentucky court that those who have been left behind had been protected by the bonus and hence they could not plead its unconstitutionality, because of the rule that those who are benefited by a law could not plead its invalidity, is more ingenious than sound. Ferguson v. Landram, 68 Ky. (5 Bush, 1868) 230. The Maine court held that a promise to pay a bonus is a contract and can not be rescinded. Hart v. Holden, 55 Maine (1868) 572. *Contra*. Terrett v. Sharon, 34 Conn. (1867) 105.

[51] "If there be the least possibility that making the gift will be promotive in any degree of the public welfare, it becomes a question of policy and not of natural justice; and the determination of the legislature is conclusive." Booth v. Woodbury, 32 Conn. (1864) 118 at 128.

[52] Veazie v. China, 50 Maine (1864) 518; Manchester v. Burns, 45 N. H. (1864) 482.

[53] Hitchcock v. Litchfield, 1 Root (Conn., 1790) 206; Franklin v. State Board of Examrs., 23 Cal. (1863) 173, 97 Am. Dec. 226; Barker v. Inhabitants of Dixmont, 53 Maine (1866) 575; Kunkle v. Franklin, 13 Minn (1868) 127; Grim v. Weissenberg School Dist., 57 Pa. St. (1868) 433, 98 Am. Dec. 237; Laughton v. Putney, 43 Vt. (1871) 485; State v. Tappan, 29 Wis. (1872) 664, 9 Am. Rep. 622 (but state can not force town to pay a bonus); United States v. Hall, 98 U. S. (1878) 343, 25 L. ed. 180; Taber v. Erie County, 151 N. Y. (1902) 432, 30 N. E. 177; Frisbie v. United States, 157 U. S. (1895) 160, 166, 39 L. ed. 657; State ex rel. v. Abbey, 15 Ohio Cir. Ct. N. S. (1911) 261 (statute of limitations does not run against soldiers' bounty); Woodall v. Darst, 71 W. Va. (1912) 350, 77 S. E. 264 (pension to injured militiaman).

[54] Crowell v. Hopkinton, 45 N. H. (1863) 9; Ferguson v. Landram, 1 Bush (Ky., 1866) 548; Bush v. Board of Supervisors of Orange County, 159 N. Y. (1899) 212, 53 N. E. 1121; Laurens v. Anderson, 75 S. Car. (1906) 62, 55 S. E. 136. In Beach v. Bradstreet, 85 Conn. (1912) 344.

§ 201. The constitutionality of the soldiers' bonus became an important question again as the result of the World War. The legislatures of thirty-eight states provided some sort of bounty and in six the constitution was amended to obviate constitutional difficulties.[55] This legislation has been before the courts in nine states, in two of which it was held void. The New York constitution prohibits extra compensation to any public officers,[56] and the bonus was held unconstitutional for that reason, but it would seem that the principles of the case would have applied equally well had there been no such specific limitation upon the use of public money.[57] In neither this case,

82 Atl. 1030, the court held void a pension law for Civil war veterans on the ground that it applied to those who had served from other states as well as to those who had served from Connecticut. The Massachusetts court has changed its attitude on this question. The earlier decisions held the bounties void. Mead v. Acton, 139 Mass. (1885) 341, 1 N. E. 413; Opinion of the Justices, 186 Mass. (1904) 603, 72 N. E. 95 (limiting the earlier case). For the present attitude of the court see Opinion of the Justices, 211 Mass. (1912) 608, 98 N. E. 338.

The courts have generally held that when an individual advanced money to pay a bounty before it had been authorized by the legislature, there was a moral obligation which might be met by the town upon subsequent legislative authorization. Freeland v. Hastings, 10 Allen (Mass., 1865) 570; Tyson v. School Directors, 51 Pa. St. (1865) 9; Weister v. Hade, 52 Pa. St. (1866) 474; State v. Sullivan, 43 Ill. (1867) 412; Johnson v. Campbell, 49 Ill. (1868) 316; Hilbish v. Catherman, 64 Pa. St. (1870) 154. *Contra:* Comins v. Eddington, 64 Maine (1875) 65. But when an individual purchased exemption no public purpose could be secured by repaying him for procuring a substitute. "It is hardly necessary to say that a statute designed to accomplish such purposes would be against common right, and would transcend the authority conferred on the legislature by the constitution." C. J. Bigelow, Freeland v. Hastings, 10 Allen (Mass., 1865) 570 at 589. See also Usher v. Colchester, 33 Conn. (1866) 567; Kelly v. Marshall, 69 Pa. St. (1871) 319; Perkins v. Milford, 59 Maine (1871) 315; Moulton v. Raymond, 60 Maine (1872) 121.

55 Kansas, Maine, Michigan, Missouri, Ohio, Oregon. For an excellent review of this legislation see Charles Kettleborough, "Soldiers' Bonus," American Political Science Review, Vol. XVI (Aug., 1922), pp. 455-460.

56 New York Constitution (1894), III, 28. See also VII, 1; VIII, 9.

57 Although the court contended that the specific limitations in the constitution required something more than a public purpose in the expenditure, the opinion pointed out that it would be void if the state had not received some specific return from the service. This is exactly the ground on which the court has decided questions of moral obligation for years. See sec. 199. The court declared that the state of New York received nothing from the service of the soldiers which the nation did not receive. People v. Westchester County Nat. Bank, 231 N. Y. (1921) 465, 132 N. E. 241.

nor indeed in that in Montana in which the bonus was held void, was there any mention of due process of law.[58]

In other states the bonus legislation was upheld on a number of grounds. Some courts relied upon the fact that custom and tradition had given its sanction to gratuities and pensions to veterans and consequently these must be upheld although other gifts are void.[59] Most of the opinions, however, placed the decision on the contention that the bounty would foster patriotism, encourage future military service, and hence promote the public defense.[60] Unquestionably the provision for public defense is a valid public purpose[61] but it seems very doubtful if the bonus has any very direct relation to it. At most the public benefit is a conjectural one, and the entire military history of the country is evidence that the expectation of a bounty is not necessary to secure enlistments. It is entirely possible that so strong a case might be made on this basis that the acts could not be upheld for this reason.[62]

[58] In both cases the law had been ratified by a popular vote, but the Montana court declared: "Were the members of this court to sanction a violation of the fundamental law, no matter how overwhelming the public sentiment therefor, or however justifiable on non legal grounds, it would expect first and severe rebuke from those who but lately exemplified their submission and devotion to constitutional authority at the risk of life itself." J. Galen, State ex rel. v. Dixon, 66 Mont. (1923) 77, 213 Pac. 227 at 234.

[59] State ex rel. v. Johnson, 170 Wis. (1919) 218, 175 N. W. 589; State ex rel. v. Clausen, 113 Wash. (1921) 570, 194 Pac. 793. The strength of this argument was admitted in People v. Westchester County Nat. Bank, 231 N. Y. (1921) 465, 132 N. E. 241.

[60] State ex rel. v. Handlin, 38 S. Dak. (1917) 550, 162 N. W. 379; State ex rel. v. Johnson, 170 Wis. (1919) 218, 175 N. W. 589; State ex rel. v. Johnson, 170 Wis. (1919) 251, 176 N. W. 224; Gustafson v. Rhinow, 144 Minn. (1920) 415, 175 N. W. 903; State ex rel. v. Clausen, 113 Wash. (1921) 570, 194 Pac. 793; Veterans' Welfare Board v. Riley, 208 Pac. (Cal., 1922) 678 (the court pointed out that the educational bonus was for the public welfare because the disabled soldiers, who were to be given free subsistence while attending the university, were to be instilled with patriotism!); Hagler v. Small, 307 Ill. (1923) 460, 138 N. E. 849; State ex rel. v. Davis, 213 Pac. (Kans., 1923) 171.

[61] Beatty v. United States, 203 Fed. (1913) 620; Rockaway Pac. Corp. v. Stotesbury, 255 Fed. (1919) 345; In re Military Training Camp, 260 Fed. (1919) 986; Old Dominion Land Co. v. United States, 296 Fed. (1924) 20; State ex rel. v. Clausen, 95 Wash. (1917) 214, 163 Pac. 744. But municipalities may not raise troops for the federal army without a special grant of power from the state. Webster v. Harwinton, 32 Conn. (1864) 131.

[62] Furthermore, if the fostering of future enlistments is the primary object, the criticism of the New York court seems in point. The state

Two courts seemed to have sensed this difficulty with the patriotism argument and indicated that other grounds were the real ones for the decision. Except for the traditional feature involved, a soldiers' bounty must stand or fall upon exactly the same grounds as any other retrospective pension to public officers. It is not so much the value to the service which prompts the expenditure as it is that there is moral obligation involved. This aspect of the case was suggested in the Washington decision,[63] but was not elaborated until the Illinois case two years later.[64] There can be no doubt that the state received something of value as the result of the defense of the United States, and in view of the well known meagreness of the soldier's pay, a moral obligation may be said to exist as truly as if the state had benefited by a building for which it had not paid. Here also there was no legal claim because of a technical bar. Furthermore, it is one of the recognized tests of a moral obligation that it must appeal to the conscience of the average individual. Since the bonus was ratified by a popular vote in so many states, this would seem to be presumptive evidence that there was such a moral obligation.[65]

§ 202. During the past century the proportion of public expenditures which have been used for such purely govern-

does not derive any benefit which the nation does not secure. The recruitment of soldiers in time of war has become a national function. Again, the state would probably benefit directly from the conversion of anarchists, but it is hardly arguable that the legislature could vote a bonus to every person with anarchial tendency in order to foster greater love for the government.

[63] State ex rel. v. Clausen, 113 Wash. (1921) 570, 194 Pac. 793.

[64] Hagler v. Small, 307 Ill. (1923) 460, 138 N. E. 849.

[65] "It is of the essence of a moral obligation that it arise out of a state of facts appealing to a universal sense of justice and fairness though upon such facts no legal claim can be based. The state may be said to owe a moral debt to an individual when his claim grows out of the principles of right and justice. When it is of such a nature as to be binding on the conscience or honor of an individual it may be said to be based upon considerations of a moral or honorary nature of which the state may take cognizance." Justice Stone, Hagler v. Small, 307 Ill. (1923) 460 at 479, 138 N. E. 849. "We can not escape the conviction that the close relation existing between the services of the individual and the general welfare of the state gives rise to a claim appealing to a universal sense of fairness and justice." *Ibid.*, p. 481.

mental functions as the administration of justice or the doling out of public charity, has steadily decreased. We are coming more and more to think of the state as a positive agency rather than one of repression. Thus, it may step into the sphere of private enterprise in either a regulatory or a proprietary capacity in so far as this may be necessary to promote such recognized objects of government as public health, public morals, or public safety. Partly on this ground and partly because of the traditional element involved, the courts have held that the powers of government may be used to provide parks and playgrounds,[66] to construct drains and sewers,[67] as well as to

[66] Shoemaker v. United States, 147 U. S. (1893) 282, 37 L. ed. 170; Adirondack R. Co. v. People, 176 U. S. (1900) 335, 44 L. ed. 492; St. Louis County Ct. v. Griswold, 58 Mo. (1874) 175; Holt v. Somerville, 127 Mass. (1879) 408; Foster v. Park Commrs., 133 Mass. (1882) 321; In re Mayor of New York, 99 N. Y. (1885) 569, 2 N. E. 647; Laird v. Pittsburg, 205 Pa. (1903) 1, 54 Atl. 324, 61 L. R. A. 333; Memphis v. Hastings, 113 Tenn. (1904) 142, 86 S. W. 609, 69 L. R. A. 750; In re City of Rochester, 102 App. Div. (1905) 181, 92 N. Y. S. 405; Lyford v. Laconia, 75 N. H. (1909) 220, 72 Atl. 1085, 22 L. R. A. (N. S.) 1062, 139 Am. St. 680; Fishblatt v. Atlantic City, 78 N. J. L. (1910) 134, 73 Atl. 125; Londoner v. City and County of Denver, 52 Colo. (1911) 15, 119 Pac. 156; Higginson v. Treasurer & S. H. Commrs. of Boston, 212 Mass. (1912) 583, 99 N. E. 523, 42 L. R. A. (N. S.) 215; Southern R. Co. v. Memphis, 126 Tenn. (1912) 267, 148 S. W. 662, 41 L. R. A. (N. S.) 828, Ann. Cas. 1913E, 153; Spokane v. Merriam, 80 Wash. (1914) 222, 141 Pac. 358; Wright v. Walcott, 238 Mass. (1921) 432, 131 N. E. 291.

The powers of government may be used to support undertakings incidental to the maintenance of parks. State ex rel. v. Brown, 111 Minn. (1910) 80, 126 N. W. 408 (can build residence for superintendent in a park); Attorney General v. Williams, 174 Mass. (1899) 476, 55 N. E. 77 (can condemn easements in surrounding property to provide adequate light and sun in park; Piper v. Ekern, 180 Wis. (1923) 586, 194 N. W. 159. But the Pennsylvania court has refused to permit the taking of land surrounding a park in order to resell with protective restrictions. Pennsylvania Mut. L. I. Co. v. Philadelphia, 242 Pa. (1913) 47, 88 Atl. 904, 49 L. R. A. (N. S.) 1062); Parsons v. Van Wyck, 56 App. Div. (1900) 329, 67 N. Y. S. 1054 (can build soldiers' monument); Bunyan v. Commissioners of Palisades I. Park, 167 App. Div. (1915) 457, 153 N. Y. S. 622 (can condemn stone quarry to secure stone for park). See also J. F. Dillon, Commentaries on the Law of Municipal Corps. (Boston, 1911), Vol. III, secs. 1034, 1035.

On the use of eminent domain to secure public fishing rights see: Albright v. Sussex County L. &c. Commn., 71 N. J. L. (1904) 303, 57 Atl. 398, 69 L. R. A. 768, 108 Am. St. 749 (void); Cox v. Revelle, 125 Md. (1915) 579, 94 Atl. 203 (valid to condemn oyster beds).

[67] New Orleans v. McDonough, 2 Rob. (La., 1842) 244; Petitioner Kingman, 153 Mass. (1891) 566, 27 N. E. 778; State v. Douglas County,

sprinkle streets[68] and otherwise provide for facilities of communication.[69]

§ 203. The real basis for these invasions of the sphere of private enterprise is the same as any other exercise of the police power. This is most clearly shown by contrasting the dispensary cases with those involving the purchase and sale of land. In order to regulate the liquor traffic more effectively, several states adopted the system of assuming a public monopoly of its sale. The South Carolina court, in the first case involving the validity of this legislation, declared the dispensary system void as a violation of the inalienable rights secured by due process of law.[70] The court failed to distinguish between prohibition of articles which were *mala per se* and those which were *mala prohibita,* and held that the legislature had no power to prohibit the liquor business. Therefore, it could not go into the business itself. This was, of course, contrary to the great weight of authority,[71] and for this reason the Federal Circuit Court upheld the law when a case was brought before it.[72] The South Carolina court, itself, overruled the first decision the year following on the ground that under the police power the legislature had the power

47 Nebr. (1896) 428, 66 N. W. 434; Sweet v. Rechel, 159 U. S. (1895) 380, 40 L. ed. 188; Watson v. New Milford, 72 Conn. (1900) 561, 45 Atl. 167. See also Dillon, Municipal Corps. (5th ed.), secs. 1034, 1148; *ante* secs. 173, 174.

[68] Maydwell v. Louisville, 116 Ky. (1903) 885, 76 S. W. 1091.

[69] Dillon, Municipal Corps. (5th ed.), 1120-1194. See also Willard v. Newburyport, 12 Pick. (Mass., 1831) 227 (tax to maintain town clock); Allen v. Taunton, 19 Pick. (Mass., 1837) 485 (purchase of fire engine); Bluffton v. Studabaker, 106 Ind. (1885) 129, 6 N. E. 1 (fire engine). See also *ante* secs. 171, 172.

[70] The court also relied on the following argument, "Although there may be no express restriction contained in a state constitution forbidding the imposition of taxes for any other purpose than a public purpose, yet such a restriction must necessarily be implied from the very nature of civil government, and hence the legislative department under the general power of taxation conferred upon it can not impose any tax except for some public purpose." C. J. McIver, McCullogh v. Brown, 41 S. Car. (1893) 220 at 249, 19 S. E. 458.

[71] See secs. 118-121.

[72] Cantini v. Tillman, 54 Fed. (1893) 969. But see Donald v. Scott, 67 Fed. (1895) 854, where such a law was held void.

to prohibit the sale of liquor, and therefore could go into the business itself.[73] The other courts which have had occasion to consider this question have found no difficulty in following this second case.[74]

It has been pointed out that there is a valid exercise of the powers of eminent domain and taxation if land is purchased for the purpose of draining it, raising its grade, and preventing it from becoming a public nuisance.[75] The relation to the police power in each of these cases is direct and obvious. In 1910, however, the question of the validity of the purchase of land in order to put through a city planning project came before the court.[76] The proposal was to purchase land in order to straighten the old streets and then to sell it subsequently to private enterprises. The judges were very much impressed with the danger of abuse in such a scheme and held it void on the authority of Lowell v. Boston.[77] The court felt that any relation which such a project might have to the police power was but slight.[78] Two years later a question was brought up as

[73] "Police power is a public purpose, and taxes levied to enable the government to enforce a law construed to be in pursuance of the police power have never been declared unconstitutional. . . . If the act is a police measure, a tax levied for its enforcement would be as lawful as a tax to raise funds to build a state house or railroad, which it has been determined beyond controversy the state always does under this power of police inherent in the government." State ex rel. v. Aiken, 42 S. Car. (1894) 222 at 241, 20 S. E. 221.

[74] Plumb v. Christie, 103 Ga. (1896) 686, 30 S. E. 759, 42 L. R. A. 181; Leesburg v. Putnam, 103 Ga. (1897) 110, 29 S. E. 602; Mitchell v. State, 134 Ala. (1902) 392, 32 So. 687; Farmville v. Walker, 101 Va. (1903) 323, 43 S. E. 558, 61 L. R. A. 125, 99 Am. St. 870.

[75] The First Municipality of New Orleans v. McDonough, 2 Rob. (La., 1842) 244; Dingley v. Boston, 100 Mass. (1868) 544; Sweet v. Rechel, 159 U. S. (1895) 380, 40 L. ed. 188. In Moore v. Sanford, 151 Mass. (1889) 285, 24 N. E. 323, 7 L. R. A. 151, it was held that a city might engage in a harbor project, but a similar proposal was held void in Hasbrouck v. Milwaukee, 13 Wis. (1860) 37, 80 Am. Dec. 718. See also secs. 173, 174, 202.

[76] Opinion of Justices, 204 Mass. (1910) 607, 91 N. E. 405, 27 L. R. A. (N. S.) 483. See also Richmond v. Carneal, 129 Va. (1921) 388, 106 S. E. 403.

[77] 111 Mass. (1873) 454, 15 Am. Rep. 39. The court declared void a tax to aid property owners to rebuild property destroyed by fire.

[78] See also Place v. Providence, 12 R. I. (1878) 1 (city can not purchase land to induce a taxpayer to abandon his suit against it); Hayward v. Red Cliff, 20 Colo. (1894) 33, 36 Pac. 795 (city can not go into the real estate business without special grant of power).

to the power of the legislature to authorize a city to purchase land, build homes, and sell them to private individuals in order to relieve congestion and thus promote the public health.[79] The police power element in this case, however, seemed to the court to be purely incidental. Had this been the main purpose it could have been much more easily accomplished by direct regulation. It appears, therefore, that the court in its desire to conserve individual rights, will look askance at any attempt to achieve a public purpose by a great invasion when the like result may be secured in other ways.[80] The real reason for the hostility of the court, however, probably grew out of the fact that the promotion of real estate subdivisions was a business ordinarily engaged in by individuals. If the state were to enter this field, the promoter would be taxed to support his rival; in this case the government.[81] This reasoning, however, can not be applied when it happens that private enterprise is not already in the field. Therefore, when the regular banking facilities are unable to extend sufficient agricultural credit, the government may supplement private efforts if the general welfare of the state demands it.[82]

[79] Opinion of the Justices, 211 Mass. (1912) 624, 98 N. E. 611, 42 L. R. A. (N. S.) 221.

[80] Thus while easements may be condemned to protect a park (Attorney General v. Williams, 174 Mass. (1899) 476, 55 N. E. 77), the land can not be purchased and resold with protective restrictions. Pennsylvania Mut. L. I. Co. v. Philadelphia, 242 Pa. (1913) 47, 88 Atl. 904, 49 L. R. A. (N. S.) 1062.

A similar contrast is presented in the use of eminent domain to improve streets. The character of buildings along certain streets may be restricted by eminent domain. State ex rel. v. Houghton, 144 Minn. (1919) 1, 174 N. W. 885, 176 N. W. 159. The right to build within thirty feet of the street may be condemned. In re Kansas City Ordinance No. 39946, 298 Mo. (1923) 569, 252 S. W. 404. But this power may not be used to replat a district for that would involve the establishment of a municipal real estate office. In re Opinion of the Justices, 204 Mass. (1910) 607, 91 N. E. 405; Richmond v. Carneal, 129 Va. (1921) 388, 106 S. E. 403.

[81] In re Opinion of the Justices, 211 Mass. (1912) 624 at 628, 98 N. E. 611.

[82] "Whatever tends to develop and improve farm lands tends also for the general good and general welfare of the entire people of this state, whether city or otherwise, and it is not unjust discrimination, under such circumstances, to tax city property for the purpose of maintaining a rural

§ 204. During the past half century there has been a great increase in the amount of municipal trading done by American cities. Not only are waterworks commonly operated by the city, but gas-works, electric lighting plants, and even street railroads are frequently municipally owned.[83] The constitutionality of municipal ownership has often been attacked, but in general, the courts have refused to say that there is no public purpose if the city has been given power by the legislature to acquire the public utility.

Some of the municipal trading enterprises have a very close relation to the public health. Unless the inhabitants of a city can rely upon an adequate supply of pure water for domestic use, they are liable to be scourged with frequent epidemics of typhoid and other diseases. Because of its obviously close relation to the police power, the courts have uniformly upheld the power of the legislature to authorize a city to acquire and maintain its own waterworks.[84] In a somewhat different way the lighting utili-

credit system such as is involved in this action." Schaaf v. South Dakota Rural Credits Board, 39 S. Dak. (1917) 377 at 387, 164 N. W. 964. See also In re Opinion of the Judges, 38 S. Dak. (1917) 635, 162 N. W. 536. In Hill v. Rae, 52 Mont. (1916) 378, 158 Pac. 826, the court held that these credits could not be administered with state funds through a private agency.

The federal legislation on this subject has not been attacked in the courts. For an admirable short survey of the federal laws see, R. J. Swenson, The National Government and Business (N. Y., 1924) secs. 143-150.

For this reason the United States Supreme Court has upheld a scheme involving the removal of an entire town to make way for an irrigation reservoir. It was evident that the project could not be accomplished except by the use of the power of eminent domain and that a wholesale transfer of the town was the only practical way of accomplishing it. Brown v. United States, 263 U. S. (1923) 78, 68 L. ed. 171.

[83] W. B. Munro, Municipal Government and Administration (N. Y., 1923), Vol. II, ch. XLVII; Dillon, Municipal Corps. (5th ed.), secs. 1290-1292.

[84] West Hartford v. Board of Water Commrs., 44 Conn. (1877) 360, 361; State ex rel. v. Hauser, 63 Ind. (1878) 155; Rochester v. Rush, 80 N. Y. (1880) 302; In re Lehigh Water Co.'s Appeal, 102 Pa. (1883) 515, 527; Smith v. Nashville, 88 Tenn. (1890) 464, 12 S. W. 924; Lamar Water & Electric Light Co. v. Lamar, 128 Mo. (1895) 188, 26 S. W. 1025, 31 S. W. 750; Aurora Water Co. v. Aurora, 129 Mo. (1895) 540, 31 S. W. 946; Huron Waterworks Co. v. Huron, 7 S. Dak. (1895) 9, 62 N. W. 975; Auburn v. Union Water Power Co., 90 Maine (1897) 576, 38 Atl. 561; North Springs Water Co. v. Tacoma, 21 Wash. (1899) 517, 58 Pac. 773; Lake County Wa-

ties have an important relation to the police power.[85] It

ter & Light Co. v. Walsh, 160 Ind. (1902) 32, 65 N. E. 530; Mayo v. Dover & Foxcroft Village Fire Co., 96 Maine (1902) 539, 53 Atl. 62; De Motte v. Valparaiso, 161 Ind. (1903) 319, 67 N. E. 985; Brockenbrough v. Board of Water Commrs., 134 N. Car. (1903) 1, 46 S. E. 28; Superior W. L. & P. Co. v. Superior, 174 Wis. (1921) 257, 181 N. W. 113, 183 N. W. 254; Sioux Falls v. Farmers' Loan & Trust Co., 136 Fed. (1905) 721; Long Island Water Sup. Co. v. Brooklyn, 166 U. S. (1897) 685, 691, 41 L. ed. 1165; Skaneateles Water Works Co. v. Skaneateles, 184 U. S. (1902) 354, 363, 46 L. ed. 585; Newburyport Water Co. v. Newburyport, 193 U. S. (1904) 575, 577, 48 L. ed. 799; Helena Waterworks Co. v. Helena, 195 U. S. (1904) 383, 388, 49 L. ed. 245; Knoxville Water Co. v. Knoxville, 200 U. S. (1906) 22, 50 L. ed. 353; Madera Waterworks v. Madera, 228 U. S. (1913) 454, 57 L. ed. 915; Denver v. New York Tr. Co., 229 U. S. (1913) 123, 57 L. ed. 1101; Joslin Mfg. Co. v. Providence, 262 U. S. (1923) 668, 67 L. ed. 1167. See also Dillon, Municipal Corp., (5th ed.), secs. 1296-1303.

The use of eminent domain to secure a garbage disposal site is likewise upheld on a basis of public health. N. Ward Co. v. Board of St. Commrs., 217 Mass. (1914) 381, 104 N. E. 965; Hoquiam v. Lenhart, 86 Wash. (1915) 625, 150 Pac. 1196.

[85] Municipal ownership of these utilities has been uniformly upheld. Gas: New Orleans v. Clark, 95 U. S. (1877) 644, 24 L. ed. 521; Rushville Gas Co. v. Rushville, 121 Ind. (1889) 206, 23 N. E. 72; Hamilton Gas-Light Coke Co. v. Hamilton, 37 Fed. (1889) 832; Fellows v. Walker, 39 Fed. (1889) 651; State v. Hamilton, 47 Ohio St. (1890) 52, 23 N. E. 935; State v. Toledo, 48 Ohio St. (1891) 112, 26 N. E. 1061. Electricity: Opinion of the Justices, 150 Mass. (1890) 592, 24 N. E. 1084; Crawfordsville v. Braden, 130 Ind. (1891) 149, 28 N. E. 849; Linn v. Chambersburg, 160 Pa. St. (1894) 511, 28 Atl. 842; Jacksonville Elec. Light Co. v. Jacksonville, 36 Fla. (1895) 229, 18 So. 677; Mitchell v. Negaunee, 113 Mich. (1897) 359, 71 N. W. 646; Slocomb v. Fayetteville, 125 N. Car. (1899) 362, 34 S. E. 436; Little Falls Elec. & W. Co. v. Little Falls, 102 Fed. (1900) 663; Middleton v. St. Augustine, 42 Fla. (1900) 287, 29 So. 421; Capital City L. & F. Co. v. Tallahassee, 186 U. S. (1902) 401, 46 L. ed. 219; Lake County Water & Light Co. v. Walsh, 160 Ind. (1902) 32, 65 N. E. 530; Gulf Coast Ice & Mfg. Co. v. Bowers, 80 Miss. (1902) 570, 32 So. 113; Joplin v. Southwest Missouri Light Co., 191 U. S. (1903) 150, 156, 48 L. ed. 127; State ex rel. v. Allen, 178 Mo. (1903) 555, 77 S. W. 868; Fawcett v. Mt. Airy, 134 N. Car. (1903) 125, 45 S. E. 1029; Swanton v. Highgate, 81 Vt. (1908) 152, 69 Atl. 667; Miller v. Pulaski, 109 Va. (1909) 137, 63 S. E. 880 (consumption must be confined to the town); Tacoma v. Nisqually Power Co. 57 Wash. (1910) 420, 107 Pac. 199; Andrews v. South Haven, 187 Mich. (1915) 294, 153 N. W. 827 (sale of appliances is valid as an incidental supplement to an electric light plant); Superior W. L. & P. Co. v. Superior, 174 Wis. (1921) 257, 183 N. W. 254; In re Opinion of the Judges, 43 S. Dak. (1920) 635 at 648, 177 N. W. 812 (state manufacture and sale of hydro-electric power is valid). It is of course necessary that there be due legislative authorization. Ottawa v. Carey, 108 U. S. (1882) 110, 27 L. ed. 669; Mauldin v. Greenville, 33 S. Car. (1890) 1, 11 S. E. 434; Spaulding v. Peabody, 153 Mass. (1891) 129, 26 N. E. 421; State ex rel. v. Mayor, 49 La. Ann. (1897) 1748, 22 So. 756, 1008.

Likewise electricity may be furnished by a plant built by special assessment. Parker v. Wallace, 80 Misc. (1913) 425, 142 N. Y. S. 523; Park v. Pacific Fire E. Co., 37 Cal. App. (1918) 112, 173 Pac. 615.

is a well known fact that there is a very close negative correlation between the effectiveness of street and park lighting and the amount of crime.[86] For this reason, if the legislature thinks a municipally owned plant is the most effective method of securing an ample supply of gas or electricity the courts hesitate to interfere.[87]

§ 205. In the case of some utilities, the city itself is one of the largest users of the product. The requirement of an adequate supply of water for the public buildings, streets, parks, and especially for fire protection, is of transcendent importance. The same is true in the matter of gas or electricity as far as the lighting of public buildings and the streets is concerned. Little question has arisen of the power of a municipality to provide for its own wants in this regard, and when this is done, the sale of the surplus to private individuals is often purely incidental. Under such circumstances there is a stronger case for municipal ownership than is otherwise the case.[88]

One of the prime characteristics of a public utility is the fact that it requires the aid of the government in order to operate successfully. Gas mains, electric light conduits, and railroad rails must be laid either in or under the street, and most of the utilities can be built only with the aid of the power of eminent domain. It therefore follows that they are quasi-public in any case, and if the government may use its funds and powers to aid them, it would hardly

[86] Munro, Municipal Government and Administration, Vol. II, p. 362.

[87] The relation of proper lighting to the public health and safety was stressed in Opinion of the Justices, 150 Mass. (1890) 592, 24 N. E. 1084; Crawfordsville v. Braden, 130 Ind. (1891) 149, 28 N. E. 849; Fawcett v. Mt. Airy, 134 N. Car. (1903) 125, 45 S. E. 1029; State ex rel. v. Allen, 178 Mo. (1903) 555, 77 S. W. 868.

[88] The municipal consumption feature was brought out in West Hartford v. Hartford, 44 Conn. (1877) 360, 361; Rochester v. Rush, 80 N. Y. (1880) 302; Smith v. Nashville, 88 Tenn. (1890) 464, 12 S. W. 924; Aurora Water Co. v. Aurora, 129 Mo. (1895) 540, 31 S. W. 946; Fellows v. Walker, 39 Fed. (1889) 651; Opinion of the Justices, 150 Mass. (1890) 592, 24 N. E. 1084; Crawfordsville v. Braden, 130 Ind. (1891) 149, 28 N. E. 849; Mitchell v. Negaunee, 113 Mich. (1897) 359, 71 N. W. 646; Gulf Coast Ice & Mfg. Co. v. Bowers, 80 Miss. (1902) 570, 32 So. 113; State ex rel. v. Allen, 178 Mo. (1903) 555, 77 S. W. 868; Fawcett v. Mt. Airy, 134 N. Car. (1903) 125, 45 S. E. 1029.

seem logical for the courts to declare that they are private as far as operation by the public is concerned. It is obvious that private enterprise is never capable of furnishing the public with the products of these utilities without government aid, and where this is the case, it is generally recognized that the public may produce and dispose of the product itself.[89]

A final feature of municipal utilities, which is sometimes suggested as a justification for municipal ownership, is the fact that they are for the "common benefit." It is of course recognized that they must be public in the sense that their services are open to all, but the argument goes considerably beyond that. It is said that because everyone in a large city must use water from the public supply, a city in taxing for the erection of a municipal waterworks is really levying a tax for the benefit of the community as a whole. Consequently, the argument continues, the tax must *a fortiori* be for a public purpose.[90] The difficulty of the contention was shown when it was applied to electric light plants and municipal railroads.[91] It could hardly be contended that everyone in the community would make use of these utilities, and to save the argument from discard the Michigan court developed the doctrine of constructive benefit, i. e., a man is presumed to be benefited indirectly, at least, by the mere fact that the utility is in operation. At best this contention is very weak, and it has not been generally accepted by the courts.[92] The argu-

[89] Opinion of the Justices, 150 Mass. (1890) 592, 24 N. E. 1084; Crawfordsville v. Braden, 130 Ind. (1891) 149, 28 N. E. 849; Superior Water, Light & Power Co. v. Superior, 174 Wis. (1921) 257, 181 N. W. 113, 183 N. W. 254; State ex rel. v. Weiler, 101 Ohio St. (1920) 123, 128 N. E. 88.

[90] This contention was suggested in Opinion of the Justices, 150 Mass. (1890) 592, 24 N. E. 1084; State v. Toledo, 48 Ohio St. (1891) 112, 26 N. E. 1061. In no case was the decision rested squarely upon that ground.

[91] Municipal ownership of street railroads has been upheld. Walker v. Cincinnati, 21 Ohio St. (1885) 14, 8 Am. Rep. 24; Sun Printing & Pub. Assn. v. New York, 152 N. Y. (1897) 257, 46 N. E. 499; Prince v. Crocker, 166 Mass. (1896) 347, 44 N. E. 446; Love v. Yazoo City, 91 Miss. (1900) 535, 44 So. 835; United Railroads of San Francisco v. San Francisco, 249 U. S. (1919) 517, 63 L. ed. 739; State ex rel. v. Weiler, 101 Ohio St. (1920) 123, 128 N. E. 88.

[92] Mitchell v. Negaunee, 113 Mich. (1897) 359, 71 N. W. 646, seems to be the only case to apply the theory.

ment breaks down on the other side as well. There are many enterprises which are essential and whose products are used well nigh universally but which can not be considered utilities by the wildest stretch of the imagination.[93]

§ 206. Within the last quarter century many cities have endeavored to extend the scope of municipal trading to these enterprises which can hardly be considered utilities. As early as 1871 the Supreme Court of Maine rendered an opinion in which it was declared that municipalities could not be given power to engage in manufacturing enterprises, for to do so would really give the majority the right to plunder the town at will. If municipal ownership were extended to other than public utilities, the property rights of those already engaged in the business, into which the town was entering, would be impaired without due process of law.[94] Toward the end of the century the question of municipal ownership of coal yards was brought before the Massachusetts court and in two opinions was declared unconstitutional.[95] The court pointed out that the coal business was not a natural monopoly and that it had never required the special powers of government to enable it to operate. Custom and tradition confirmed the view that it was purely a private enterprise even though it did promote the welfare of a large number of individuals.[96] In the second opinion the court went

[93] E. g., bread, clothing, shoes, etc. See Aurora v. West, 9 Ind. (1857) 74.

[94] "The entering into contract is a consensual act. The formation of a partnership is a contract. The consent of the partners is necessary thereto. The legislature could not, by any such statute, compel individuals without their consent to be partners and to assume the liabilities of partnership. . . . . It is despotically taking the control of capital from its owners and transferring it to others. It is enabling the majority of a town to incur unlimited indebtedness. If the towns can embark in manufacturing, they can create a partnership, by which all property of the inhabitants is pledged to meet the contingencies of business." In re Opinion of the Justices, 58 Maine (1871) 590 at 597.

[95] Opinion of the Justices, 155 Mass. (1892) 598, 30 N. E. 1142; Opinion of the Justices, 182 Mass. (1903) 605, 66 N. E. 25. See also the *dicta* in Aurora v. West, 9 Ind. (1857) 74.

[96] "Promotion by taxation of the private interests of many individuals is not a public service within the meaning of the constitution." Opinion of the Justices, 155 Mass. (1892) 598 at 602, 30 N. E. 1142.

further and showed that private enterprise was usually adequate to meet the necessities of a supply of fuel, but it was suggested that, should an emergency of sufficient seriousness arise, the state might step in to avert actual famine.[97] The reasoning in this opinion was followed in a Michigan case three years later.[98]

In 1914, however, the Maine court upheld the act authorizing the City of Portland to furnish fuel to its inhabitants. Little consideration was given to the argument that the coal business was not a public utility, but the court declared that an emergency existed and, since coal was a necessity, it could be furnished by the city.[99] Another case involving the same point was appealed to the United States Supreme Court, and the decision of the Maine court was upheld on the ground that the federal body had no facilities for determining if an emergency actually existed or not and so must take the decision of the lower court as conclusive.[1] By implication, at least, the argument that because coal is a necessity in modern society, it may be distributed municipally, was affirmed.[2]

§ 207. The difficulty inherent in this view is clearly shown in the cases involving the validity of municipal ice plants. In certain localities, there can be no question that

97 Opinion of the Justices, 182 Mass. (1903) 605, 66 N. E. 25.

98 Baker v. Grand Rapids, 142 Mich. (1906) 687, 106 N. W. 208.

99 "If the difficulty of obtaining an adequate supply exists, the furnishing of such supply by municipalities would be a public use." Laughlin v. Portland, 111 Maine (1914) 486 at 498, 90 Atl. 318; Jones v. Portland, 113 Maine (1915) 123, 93 Atl. 41.

1 "While the ultimate authority to determine the validity of legislation under the Fourteenth Amendment is rested in this court, local conditions are of such varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authorities, legislative and judicial, have peculiar facilities for securing accurate information. In that view the judgment of the highest court of the state upon what should be deemed a public use in a particular state is entitled to the highest respect." Justice Day, Jones v. Portland, 245 U. S. (1917) 217 at 221, 62 L. ed. 252. It should be noted that this case did not arise, as might be supposed, out of a shortage due to the war. Consequently to presume that a shortage existed, seems to be taking a great deal for granted.

2 The Oregon Supreme Court has said that municipal coaling of ships by the city of Portland would be constitutional. Stevenson v. Portland, 82 Ore. (1917) 576, 162 Pac. 509.

ice is a necessity. Without adequate refrigeration, life would be intolerable, and it is even conceivable that the public health would be endangered. Upon this basis the Supreme Court of Georgia upheld an act permitting municipalities to build their own ice plants.[3] But the real question in the case seems to be whether private enterprise can and has furnished ice in sufficient quantities to protect the public necessity. In other words, is an ice plant a public utility? That it is not is obvious, and for this reason municipal ice plants have been held unconstitutional in Louisiana and Missouri.[4] The strictness with which some of the courts limit municipal undertakings to public utilities is shown by the decisions which hold that the city can not go into the amusement business.[5] It must be concluded that even public convenience is not a public purpose except in a very restricted sense. If the enterprise is one which is purely incidental to other well recognized projects of municipal trading, public convenience may justify the city in engaging in it.[6] It is significant, however, that the courts construe this rule very strictly, and have held that the plumbing business is not incidental to the operation of waterworks,[7] nor is the production of

[3] Holton v. Camilla, 134 Ga. (1910) 560, 68 S. E. 472; Saunders v. Arlington, 147 Ga. (1918) 581, 94 S. E. 1022.

[4] Union Ice & Coal Co. v. Ruston, 135 La. (1914) 898, 66 So. 262; State v. O'Rear, 277 Mo. (1919) 303, 210 S. W. 392.

[5] Bloomsburg Land Imp. Co. v. Bloomsburg, 215 Pa. St. (1906) 452, 64 Atl. 602 (city can not conduct an amusement park); Brooks v. Brooklyn, 146 Iowa (1910) 136, 124 N. W. 868 (municipal theatre illegal); State ex rel. v. Lynch, 88 Ohio St. (1913) 71, 102 N. E. 670 (municipal theatre illegal); Sherburne v. Portsmouth, 72 N. H. (1914) 539, 58 Atl. 38 (city can not build a ball park).

[6] Schneider v. Menasha, 118 Wis. (1903) 298, 95 N. W. 94 (city may quarry stone for its public buildings); Andrews v. South Haven, 187 Mich. (1915) 294 (city may sell appliances in connection with operating an electric lighting plant); Outagamie County v. Zuehlke, 165 Wis. (1917) 32, 161 N. W. 6 (counties may go into abstract business as part of work of recording deeds); Beck v. Board of Commrs. of Shawnee County, 105 Kans. (1919) 325, 182 Pac. 397 (can sell products from poor farm); Hamden v. New Haven, 91 Conn. (1917) 589, 101 Atl. 11 (can sell products from poor farm). But a municipal cement plant has been declared not a public purpose. Los Angeles v. Lewis, 175 Cal. (1917) 777, 167 Pac. 390.

[7] Keen v. Waycross, 101 Ga. (1897) 588, 29 S. E. 42.

cement for public sale incidental to its production for municipal use.[8]

§ 208. The same rules would seem to apply to attempts of the state to engage directly in enterprises, with the exception that such projects must, of course, be to the advantage of the entire state and not only to a given locality. In 1894 the Minnesota court held that the state could not erect a publicly owned elevator, because of a special constitutional provision prohibiting it from engaging in internal improvements.[9] Under a similar provision the Kansas court has held that the state could not operate an oil refinery in competition with private enterprise.[10] When private initiative has not entered the field, a different situation is presented. Under these conditions the South Dakota court upheld legislation establishing a public cement plant.[11]

§ 209. The most important group of cases involving state socialism arose out of the legislation fostered by the Non-Partisan league in North Dakota. Under constitutional provisions enacted especially for that purpose the legislature established a state bank, state elevator, state mills, state marketing organization, and state credit agencies. This program was bitterly contested in the state

[8] Los Angeles v. Lewis, 175 Cal. (1917) 777, 167 Pac. 390. Upon the same basis the Louisiana court held that although an electric light plant could be operated more economically if there was an ice plant in connection with it, one could not be considered incidental to the other. Union Ice & Coal Co. v. Ruston, 135 La. (1914) 898, 66 So. 262.

[9] Rippe v. Becker, 56 Minn. (1894) 100, 57 N. W. 331. An elevator, if open to the public, is a public utility according to Munn v. Illinois, 94 U. S. (1876) 113, 24 L. ed. 77.

[10] State v. Kelly, 71 Kans. (1905) 811, 81 Pac. 450.

[11] "The manufacture, distribution, and sale of cement and cement products by the state will tend to promote the public welfare, prosperity and contentment of all the citizens of the state, and will tend to secure equality of economic opportunity." Eakin v. South Dakota State Cement Commn., 44 S. Dak. (1921) 268 at 272, 183 N. W. 651. Nevertheless, he took great care to show that an actual shortage of cement had existed for two years and that there was not a cement plant within the state or within 175 miles of its borders. See also Opinion of the Judges, 43 S. Dak. (1920) 648, 180 N. W. 957; Los Angeles v. Lewis, 175 Cal. (1917) 777, 167 Pac. 390; Fisher v. Board of Regents, 108 Nebr. (1922) 666, 189 N. W. 161 (university can make and sell serum for hog cholera).

courts, in the lower federal courts, and in the United States Supreme Court but was upheld in every case. Every decision rested chiefly on the ground that the general welfare would be served by these enterprises, but in no case was any effort made to dig below the surface to see in what the general welfare consisted. With almost no consideration of precedent,[12] the decisions seem to lay down the broad proposition that the majority may engage in any business which they conceive to be for the general welfare.[13] The United States Supreme Court upheld the legis-

[12] The nearest attempt to look to precedent was the remark by District Justice Amidon. "I have not been able to discover any instance in which the Supreme Court has held invalid an exercise of the taxing power of the state for establishing and maintaining an industry which was owned by the state or a municipality." Scott v. Frazier, 258 Fed. (1919) 669 at 676. While superficially this is true, the reasoning of Loan Assn. v. Topeka, 20 Wall. (U. S., 1875) 655, 22 L. ed. 455, seems directly to the point, although the occasions which gave rise to the two cases are somewhat different.

[13] Notice the breadth of the statements of the courts. A private business "may be defined as a business or enterprise in which an individual or individuals, an association, copartnership, or private corporation have invested capital, time, attention, labor, and intelligence for the purpose of creating and conducting such business, for the sole purpose that those who make such contributions may, from the conducting of such business, make, gain, and acquire a financial profit, for their exclusive benefit, improvement, and enjoyment, and exclusively, for their own private purposes. . . .

"As contradistinguished from a private business, a public purpose or a public business has for its objective the promotion of the general welfare of all the inhabitants or residences, within a given political division, as, for example, a state, the sovereignty and sovereign powers of which are exercised to promote the public health, safety, morals, general welfare, security, prosperity, contentment, and equality before the law of all the citizens of the state." Justice Grace, Green v. Frazier, 44 N. Dak. (1920) 395 at 412, 176 N. W. 11.

"It is of course the prime function of government to secure and preserve equality of economic opportunity, and in order to do so the state must concern itself with the facts. It is confronted by a condition. If the people of the state, through the adoption of constitutional amendments (going back a number of years, for instance, to the adoption of amendments authorizing public ownership of terminal elevators), and by the adoption at referendum election of acts of the legislature submitted for their approval, conceive that the conditions to be dealt with require a limited public ownership of businesses or utilities as instrumentalities to be employed in securing a greater degree of equality of economic opportunity, their judgment upon such a question is entitled to the greatest weight." Justice Birdzell, *Ibid.*, at pp. 428, 429.

"The power of taxation lies in a field of even broader legislative discretion than the 'police power' under which constitutional questions have been most frequently raised." Justice Amidon, Scott v. Frazier, 258 Fed. (1919) 669 at 675.

lation because the state Supreme Court had declared it valid,[14] and the state court upheld it because the people had declared that it was for the public welfare in a popular referendum.[15] It is hardly conceivable that the court will be able to follow this precarious method of disposing of the constitutionality of important invasions of private rights to any great extent.[16] It is very possible that the actual conditions in North Dakota were such that private enterprise was unable to furnish proper facilities of the sort under discussion. Certainly several of the projects could have been upheld as public utilities. But the courts refused to take this safe method of disposing of the case, and preferred to take the law by the horns and throw it where it wished.

That these decisions were directly contrary to the current of legal development in regard to due process of law hardly needs argument. Under the concept of public purpose, the courts have consistently hewed to a rather straight line in determining what is and what is not a governmental purpose. There are plenty of cases to indicate that everything which the government decides to do is not "governmental" in the sense that it may be for a constitutional public purpose. Where the court has permitted extensions of the idea of governmental functions, it has been because there were such concepts as that of a "public utility" already at hand to which it might tie the extension. This seems to have been the first important group of cases in which the boat has been allowed to drift without even an oar. But in view of the inevitable tendency of the court to work out landmarks after a series of cases have been decided, it is hardly probable that the boat will be allowed to drift long.

14 Green v. Frazier, 253 U. S. (1920) 233, 64 L. ed. 878.

15 "What is or what is not a public purpose must necessarily depend upon the condition which calls forth the particular activity on the part of the state. The economic and legislative history of the state affords the chief repository of information to be drawn upon in the decision of the question." Justice Birdzell, Green v. Frazier, 44 N. Dak. (1920) 395 at 428, 176 N. W. 11.

16 To do so would practically destroy the importance of the concept of public purpose in taxation.

PART X.

QUESTIONS OF FACT AND PUBLIC OPINION.

CHAPTER XXIV.

EVIDENCE IN DUE PROCESS CASES.

§ 210. Two types of constitutional decisions under the due process clause bring up, in a special way, questions of fact.[1] In those cases where the central problem is one of classification, it is evident that, unless the actual conditions surrounding the classification are such as to disclose a reasonable justification for the class distinction, the class distinction becomes an arbitrary discrimination. The determination, therefore of the constitutionality of the law depends upon the determination of the further question of whether there is a real distinction between the

[1] On the whole question of the distinction between questions of law and questions of fact in cases of constitutional law, see J. D. Barnett, "External Evidence of the Constitutionality of Statutes," American L. Rev., Vol. 58 (Jan., 1924), pp. 88, 89. After an extensive formalistic review of the cases, Mr. Barnett arrives at the conclusion that there is no basis of distinction between these two types of questions. The earliest magazine discussion of this problem seems to have been Towner, H. M. "Public Opinion and the Police Power," Case and Comment, Vol. XX (Oct., 1913), pp. 308, 309. Undoubtedly the most thorough analysis of this general problem is that of H. W. Bickle, "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action," Harv. L. Rev., Vol. 38 (Nov., 1924), pp. 6-27. An excellent summary with special regard to the state cases is that of W. G. Katz, "Judicial Attitude toward Questions of Fact in Determining the Appropriateness of Police Power Measures" (unpub., 1923). There is a good discussion of one aspect of the question by Felix Frankfurter, "Hours of Labor and Realism in Constitutional Law." Harv. L. Rev., Vol. 29 (Feb., 1916), pp. 353-373.

classes established, in view of the particular circumstances. If the courts are to effectively exercise their function of reviewing acts of the legislature, it is obvious that they must dispose of this question of fact, or else they will be deciding important constitutional matters on the basis of pure guesswork.

In a similar manner, questions of fact come up in a very large number of cases involving social legislation. Most of these acts, aimed to secure better working or living conditions for the mass of the people, are in the exercise of the general police power of the state. It is necessary, therefore, that the law be related in a vital manner to the great generic concepts of health, morals, public order, safety, prevention of fraud, etc., if the requirements of due process are to be satisfied. Not infrequently the whole question at issue is whether the act under discussion, in reality, contributes to one or more of these recognized objects. The legislature certainly can not invade the rights of person or property "under the guise of a mere police regulation, when it is not such in fact," and it is likewise evident that "it is the province of the courts to determine whether it is really an appropriate measure for the promotion of these objects."[2]

It is also necessary that the law be not unduly exacting or oppressive, if it is not to violate due process. There must be some sort of reasonable balance between the degree of interference with private rights and the public benefit which may be expected to flow from that interference. Although this principle has long been impliedly accepted by the courts,[3] no question of fact seems to have arisen under it until the decision involving the validity of the Nebraska law fixing minimum and maximum weights for loaves of bread.[4] It is evident that the questions of

[2] Justice MacCruder in Ritchie v. People, 155 Ill. (1910) 98, 40 N. E. 454. See also State v. Legendre, 138 La. (1915) 154, 70 So. 70.

[3] See secs. 129, 158-161.

[4] The statute imposed particularly onerous restrictions upon bakeries in order to prevent fraud in the weight of loaves of bread offered for sale. It was admitted that the legislature under the police power could protect

fact which are apt to arise in cases of this sort are liable to be exceedingly intricate and difficult for they may involve a large number of technical factors of a variable, to say nothing of a conflicting, nature. No better example could be cited to indicate the necessity of better technical facilities for the judicial determination of social and industrial facts with which the court is apt to be, to say the least, unfamiliar.

§ 211. The failure of the judges to take questions of fact into consideration has caused no small amount of difficulty, and has contributed in no small measure to the criticism that has been heaped upon the judiciary in recent years. It forms the basis of the frequent accusation that the courts have been guilty of the most cardinal of all judicial sins—vacillation. Innumerable critics of our institutions hail with joy, or deplore with regret, according to their temperaments, what seems at first blush, to be a frank avowal of the theory that the courts decide cases according to the social, political and economic philosophy of their members, rather than according to legal precedent. As Charles M. Hough put it, courts "have more and more made due process of law whatever process seems due to the de-

purchasers from short weight loaves. See Schmidinger v. Chicago, 226 U. S. (1913) 578 at 588, 57 L. ed. 364. The real point at issue was whether the benefits which would be expected to flow from the particular restrictions of the act in question would be counterbalanced by benefits to the public at large. Justice Butler, in declaring the law void, pointed out that as it was drawn the only advantage would be to purchasers of twenty-five loaves at a time, for the law did not require single loaves to be within the prescribed weight. Consequently, the public advantage of the peculiar provisions of this law was very slight. In view of the conflicting evidence on the burden which it imposed on the baking industry, he concluded that it was arbitrary for "Imposition through short weights readily could have been dealt with in a direct and effective way." Jay Burns Baking Co. v. Bryan, 264 U. S. (1924) 504, 68 L. ed. 813.

Justice Brandeis, in an able dissenting opinion, presented a synopsis of a great bulk of evidence to show: 1. That other legislation had failed and consequently this particular law was necessary. 2. That the law will prevent fraud through the entire retail bakery business. 3. That it would not greatly increase the cost of producing bread. It is evident that the difference in opinion is one of fact rather than law, and it is to be regretted that Justice Butler did not go into the factual basis for his opinion with greater thoroughness.

mands of the times, as understood by the judges of the time being."[5]

Such a criticism is not without some basis in fact when one considers the statements of such justices as Oliver Wendell Holmes.[6] It is important to remember, however, that one judge does not make a court, nor does one *dicta* establish a legal truth. Likewise, the important distinction between questions of fact and questions of law points the way deeper than the occasional effervescence of an over-worked judicial mind, to the fundamental principles which guide the courts in the determination of classification and police power questions. Furthermore, it is important to remember that the present attitude of certain members of the court is of comparatively late growth, having been discernible only during the past fifteen years.[7] It is, indeed, a failure to recognize the true nature of this development that has misled some of the most severe critics of the judicial system.[8]

§ 212. Not only must it be recognized that there is a different technique required in deciding questions of fact and in deciding questions of law, but there is also

[5] Charles M. Hough, "Due Process of Law—Today" (lecture on the Frank Irvine Foundation, May 3, 1918; Cornell Univ.), Harv. L. Rev., Vol. 32 (Jan., 1919), p. 218 at 233.

[6] "It may be said in a general way that the police power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." Noble State Bank v. Haskell, 219 U. S. (1911) 104, 55 L. ed. 112.

[7] See R. E. Cushman, "Social and Economic Interpretation of the Fourteenth Amendment," Mich. L. Rev., Vol. 20 (May, 1922), p. 737. Note also the statement of the Michigan court: "There is a manifest absurdity in allowing any tribunal, either court or jury, to determine from testimony in the case the question of the constitutionality of the law. . . . The first case presented might show by the opinions of many witnesses that the use of the dry emery wheel is almost necessarily fatal to the operative, while the next might show exactly the opposite state of facts. . . . The court of last resort . . . would have no means of ascertaining whether it was a collusive case or not, or whether the weight of evidence was in accord with the truth." People v. Smith, 108 Mich. (1896) 527 at 533, 66 N. W. 382.

[8] A. M. Kales, "New Methods in Due Process Cases," Amer. Polit. Science Rev., Vol. XII (May, 1918), p. 341; Frank J. Goodnow, Social Reform and the Constitution (N. Y., 1911), ch. VIII.

the very practical difference that decisions on facts are not taken as precedents in subsequent cases, while decisions on matters of law are so considered.[9] Therefore, if we are to

[9] See the particularly significant statement of Justice Holmes in Chastleton Corporation v. Sinclair, 264 U. S. (1924) 543, 68 L. ed. 841. "A court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed. Perrin v. United States, 232 U. S. [1914] 478, 486, 487, 58 L. ed. 691; Missouri v. Chicago, Burlington &c. R. Co., 241 U. S. [1916] 533, 539, 540, 60 L. ed. 1148. In Newton v. Consolidated Gas Co., 258 U. S. [1922] 165, 66 L. ed. 538, a statutory rate that had been sustained for earlier years in Willcox v. Consolidated Gas Co., 212 U. S. [1909] 19, 53 L. ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134, was held confiscatory for 1918 and 1919." Pages 547, 548. In this case the court refused to declare before investigation that the law was still valid which permitted the fixing of rents in the District of Columbia.

The failure to distinguish between the binding character of facts and law as judicial precedents led the Indiana Supreme Court into a very awkward situation in 1918. The legislature had passed a prohibition statute which was contested as unconstitutional. In an old decision (1855) the court had held such a law void. Beebe v. State, 6 Ind. (1855) 501, 63 Am. Dec. 391. The court was put to it to justify their action in upholding the 1918 statute. Justice Townsend cut the Gordion Knot in the following naive manner.

"The principle of stare decisis, if it existed, has no application to the police power because there can be no property rights which are not subject to this power. . . . If this were not so, mistaken decisions would destroy that very power of society to protect itself and a new constitution would be created by the courts. Courts can not decide away that which the state can not contract away. Courts can not make a new fundamental law by erroneously reading limitations into the constitution not therein expressed. The principle of stare decisis is a rule of property the use of which does not affect the public welfare. It can not be invoked to shut off police power." Schmitt v. F. W. Cook Brew. Co., 187 Ind. (1918) 623 at 628-630, 120 N. E. 19 at 21.

It is obvious that the rule of stare decisis can not apply to questions of fact under the police power for the powers of government must be adequate to meet new situations as they arise out of new facts. Furthermore, scientific discoveries may show the relation to valid police power objects of certain legislation which heretofore was considered totally unrelated to them. This indeed seems to be the situation in regard to liquor legislation. At the same time, no one can maintain that the rule of stare decisis does not apply to questions of law under the police power. To hold this would virtually destroy the chief benefit of constitutional control of these matters.

The method followed by the New York court in case of People v. Chas. Schweinler Press, 214 N. Y. (1915) 395, 108 N. E. 639, seems vastly better. The case involved the validity of a law forbidding night work for women. Such a law had been held void in People v. Williams, 189 N. Y. (1907) 131, 81 N. E. 778. In the Schweinler case the court explained the difference as follows:

"While theoretically we may have been able to take judicial notice of

lay down any principles of what constitutes due process of law in these cases, the attitude of the courts toward questions of facts is very important. The increasing tendency of the judges to recognize the significance of various types of facts points to the effect of the changing social and economic conditions upon the legal science, and demonstrates not only that it is an expanding science, but that it is striving to keep pace with the rapidly growing complexity of problems with which it has to deal. For similar reasons the technique of the courts in dealing with questions of fact is very important. It demonstrates that they are forced, by the very exigencies of their increased work, to call to their aid all the available agencies for the settlement of these questions. The divergence of opinion as to the satisfactory methods of determining these facts indicates the need for additional sources of technical information for the courts.

§ 213. The first of these methods of deciding questions of fact is judicial notice, a means which antedates our constitutional system by several centuries. It had been the current practice in the English common law courts to consider certain classes of matters subject to judicial notice, and hence not needing proof before the court. In this way the judge would save time by declaring that all previous decisions, all official acts, the meaning of the words of common speech, the time of day, the location of well known cities, etc., need not be proved by evidence because they were in the range of common experience.[10]

some of the facts and some of the legislation now called to our attention, as sustaining the belief and opinion that night work in factories is . . . injurious to the health of women, actually very few of these facts were called to our attention, and the argument to uphold the law on that ground was brief and inconsequential. . . .

"There is no reason why we should be reluctant to give effect to new and additional knowledge upon such a subject as this, even if it did lead us to take a different view of such a vastly important question as that of public health or disease, than formerly prevailed." Justice Hiscock at pp. 411, 412.

[10] John Bouvier, Law Dictionary (8th ed. by Francis Rawle, St. Paul, 1914), Vol. II, p. 1734.

An excellent discussion of the whole problem of judicial notice may be found in J. H. Wigmore, Treatise on the System of Evidence (Boston,

The theory behind the doctrine was that, since these things are in the range of common experience, there can be no dispute among informed men regarding them. Consequently, every reasonable doubt must be resolved against judicial notice, and wherever a legitimate question could possibly be raised, it was necessary to admit evidence to prove the fact under discussion.[11]

The courts very early used this doctrine to dispose of questions of fact which might arise in cases involving due process of law. In 1837 the Supreme Court of South Carolina took judicial notice that vagrancy was an evil at common law, and hence could be dealt with in a summary fashion.[12] A little later the common law basis for the evils dealt with were judicially noticed as evidence of the relation of the law to public welfare. It is upon this basis that liquor laws have generally been upheld by the state courts,[13] and the United States Supreme Court, in upholding the Kansas prohibition law, stated in most vigorous language the evils of the liquor traffic and the close relation between its prohibition and the general welfare.[14] In fact, so great has the evil of intoxicants been considered by the courts, that they allow special taxes from saloons to support reformatories for habitual drunkards, even though it can be proved that the individual saloon in question contributed nothing to the drunkenness of the community.[15]

1905), Vol. IV, secs. 2565-2570. The historical development of the doctrine is traced in a learned chapter in J. B. Thayer, Preliminary Treatise on Evidence at Common Law (Boston, 1898), ch. VII.

[11] Brown v. Piper, 91 U. S. (1875) 37 at 41, 23 L. ed. 200.

[12] State v. Maxcy, 1 McMul. (S. Car., 1837) 501. The same rule was applied in State v. Hogan, 63 Ohio St. (1900) 202 at 210, 58 N. E. 572.

[13] See sec. 120.

[14] "There is no justification for holding that the state, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we can not shut out of view the fact within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are to some degree at least, traceable to this evil." Mugler v. Kansas, 123 U. S. (1887) 623 at 662, 31 L. ed. 205.

[15] Leavitt v. Morris, 105 Minn. (1908) 170, 117 N. W. 393.

The common-law basis of the restriction has also been judicially noticed by the courts in supporting a great many other regulations. Among these are laws dealing with vice, public nuisances, sanitary drainage, etc.[16]

§ 214. It was not, however, until the very end of the nineteenth century, when cases were appealed more and more rapidly under the due process provision, that the courts began to feel the importance of questions of fact to any considerable extent. The question of Sunday laws had caused some difficulty many years before, and at least one court had reversed itself upon this question. In this instance, there can be no doubt that the court was influenced by a further reflection on the facts involved, although it did not recognize that influence in its opinion.[17] Perhaps the most interesting and certainly the most significant case of this nature was that involving the Minnesota law which declared that barber-shops were not "necessary establishments" and so could not be kept open on Sundays. In upholding the law, both the state and federal courts took judicial notice of the long hours of barbers, especially on Saturday, and declared that, in view of these circumstances, the legislature could make special provision for them.[18] Another case in which judicial notice was used to determine a question of fact under the equality concept of due process came up in Georgia, where the court justified an ordinance, requiring women to remove their hats in theaters, by taking notice of the fact that public opinion forced men to remove theirs.[19]

[16] L'Hote v. New Orleans, 177 U. S. (1900) 587, 44 L. ed. 899; Ex parte Quong Wo, 161 Cal. (1911) 220, 118 Pac. 714; Nickerson v. Boston, 131 Mass. (1881) 306. A similar basis is found for the cases in which an act is upheld because of a long period of settled legislative policy. People ex rel. v. Murray, 149 N. Y. (1896) 367 at 376, 44 N. E. 146.

[17] Ex parte Newman, 9 Cal. (1858) 502; Ex parte Andrews, 18 Cal. (1861) 678. The latter decision held the law valid.

[18] Petit v. Minnesota, 177 U. S. (1900) 164, 44 L. ed. 716. A general Sunday Law had been upheld in Hennington v. Georgia, 163 U. S. (1896) 299, 41 L. ed. 166. Some states have declared such laws void. Eden v. People, 161 Ill. (1896) 296, 43 N. E. 1108; State v. Petit, 74 Minn. (1896) 376, 77 N. W. 225.

[19] Oldknow v. Atlanta, 9 Ga. App. (1911) 594, 71 S. E. 1015.

The doctrine that matters of common knowledge, in addition to matters recognized at common law, need not be proved before the court, has also been applied in cases involving the validity of the object in police power regulations. The New York court took notice that tobacco was not unhealthy, and hence a law forbidding tobacco manufacture in tenements could not be considered a health measure.[20] In Washington the court took notice of the rapid increase in the system of licensing occupations, and that frequently the licenses were required merely for the purpose of limiting the number in the profession or trade, rather than raising money or protecting the public welfare.[21] More recently, in the Kansas Industrial Court case, the Supreme Court took notice of the fact that local emergencies were less dangerous than nation wide ones.[22] On the other hand, in the last decade some courts have taken notice of the need for social legislation, and have concluded, for this reason, that the legislature had a valid object in passing such laws.[23] A recent example of this was in connection with the emergency in rent law cases in which the housing shortage growing out of the war was judicially noticed as evidence of the existence of the emergency.[24]

[20] In re Jacobs, 98 N. Y. (1885) 98, 2 N. Y. Cr. 539, 50 Am. Rep. 636. They failed to consider the unhealthful effect of the tenement on the tobacco and its subsequent user. Nor did they consider the effect of any kind of tenement house labor upon the worker irrespective of the healthy, or unhealthy nature of the article manufactured. Contrast the attitude here with that in State v. Hyman, 98 Md. (1904) 596, 57 Atl. 6, 64 L. R. A. 637.

[21] State ex rel. v. Smith, 42 Wash. (1906) 237, 84 Pac. 851.

[22] Wolff Pack. Co. v. Court of Indus. Relations, 262 U. S. (1922) 522, 67 L. ed. 1103.

[23] "It is a matter of common knowledge of which we take judicial notice that conditions have arisen with reference to the employment of women which has made it necessary for many of the states to appoint commissions to make a detailed investigation . . . of their wages." Justice Hart also pointed out that the wages of women had a close relation to their health. State v. Crowe, 130 Ark. (1917) 272, 197 S. W. 4. See also the opinion of the Missouri Court in State v. Missouri Pac. R. Co., 242 Mo. (1912) 339, 147 S. W. 118.

In Wilson v. New, 243 U. S. (1917) 332, 61 L. ed. 755, the court took judicial notice of the existence of an emergency in interstate commerce.

[24] People ex rel. v. La Fetra, 230 N. Y. (1921) 429, 130 N. E. 601. Other cases in which the courts have taken judicial notice of the density

§ 215. It is evident that the doctrine of judicial notice, when applied to questions of fact in due process cases, is subject to a number of important limitations. In the days when there were only three learned classes in the community—doctors, ministers and lawyers—the court was in a much better position to take judicial notice of the necessary facts than it is at present. The rapid growth of technical knowledge in so many branches of human inquiry, has removed many important matters far from the realm of judicial experience. Under such conditions, a judicial notice, if applied very extensively, becomes little more than a guess. That guess, furthermore, is invariably warped by the social and economic philosophy of the court rendering the opinion.[25] If the judge's philosophy happens to be suited to present day conditions, the resulting decision is viewed as progressive, but if his philosophy was that of the last generation, the result is likely to be farcical.

During the past two decades there has been a great deal of criticism of the courts founded upon this very situation. Most of the critics, however, have failed to look beyond the superficial veil of their own prejudices to the judicial reasoning which forms the basis of the decisions, and almost none have recognized that the difficulty was due not to the antediluvian philosophy of the judges, but to their failure to recognize the importance of scientific determinations of facts. If the courts are to take judicial notice of matters they know nothing of, we can hardly expect their decisions to be scientific. It is not that the reasoning methods of the courts are faulty as regards the legal questions involved; the difficulty lies in their technique in securing and handling the facts.

of the population are: Toledo, W. &c. R. Co. v. Jacksonville, 67 Ill. (1873) 37, 16 Am. Rep. 611; In re Smith, 143 Cal. (1904) 368, 77 Pac. 180; Bonnett v. Vallier, 136 Wis. (1908) 193, 116 N. W. 885, 17 L. R. A. (N. S.) 486.

See also the declaration of Justice Holmes that it was common knowledge that the number of governmental employees in Washington had been reduced since the war, and therefore that the rent emergency may have passed. Chastleton Corp. v. Sinclair, 264 U. S. (1924) 543, 68 L. ed. 841.

[25] See C. G. Haines, "Effects of Personal, Political, and Economic Influences in the Decisions of Judges," Ill. L. Rev., Vol. 17 (June, 1922), pp. 96-116.

In spite of these fundamental limitations upon the doctrine of judicial notice in due process cases, the courts continue to use it. If only the simpler matters of life are involved, the venerable method undoubtedly works very well and often saves both court and litigant time and expense. But when complex, scientific information is necessary, the courts are sometimes forced to discard judicial notice. The increasing frequency of the courts' resort to other sources for its facts than its own impressions is very encouraging. It is a recognition by the courts themselves of the limitations of the older technique.

§ 216. The sources of judicial information in cases involving constitutional questions are very meagre. The transcript of record may contain ample proof of facts regarding the conduct of the particular parties to the suit, but the important facts upon which the constitutionality of the law rests are usually not included. Since they are not relevant to the situation of the particular parties to the suit, they are not submitted to the jury and hence there is no verdict on them.[26] Indeed, it is evident that the grossest injustice might result if these matters were left to a jury determination. The jury in the first case might be impressed with evidence and hold the law related to public health, which a second jury might hold exactly the opposite on the basis of the same evidence.[27] Furthermore, the

[26] So in State v. Cantwell, 179 Mo. (1904) 245, 78 S. W. 569, affd., Cantwell v. Missouri, 199 U. S. (1905) 602, 50 L. ed. 329. Occasionally there may be incidentally in the record of the case the very facts which the court may need. In Levy Leas. Co. v. Siegel, 258 U. S. (1922) 242 at 246, 66 L. ed. 595, the court declared that there was no doubt of the existence of an emergency for the plaintiff was suing for double the rent he had charged before.

[27] People v. Smith, 108 Mich. (1896) 527, 66 N. W. 382. This consideration would seem to account for the following statement: "It would be a dangerous rule to declare that the validity or invalidity of an act of the legislature can be the subject of collateral attack as to the facts upon which the legislature has acted; that is that a jury may determine from evidence adduced before it, or from lack of evidence, that an act is or is not invalid, with as many varying conclusions as there might be bodies of triers, or upon such facts as ingenuity might suggest, as matters of opinion or actual facts in evidence." Pittsburg, C., C. &c. R. Co. v. State, 180 Ind. (1913) 245 at 252, 253, 102 N. E. 25, L. R. A. 1915D, 458.

whole question is one for accurate scientific determination for which the jury is entirely unfitted.

If the court is to have before it scientific data upon which to render a rational decision, it must obtain it in other ways. One of the first attorneys to realize this was Louis D. Brandeis, and in his brief in the case of Muller v. Oregon there was included a careful statement of the facts which gave rise to the necessity of the law limiting the hours of women workers.[28]

The striking success of Mr. Brandeis' method made a profound impression upon the legal profession and in a considerable number of subsequent cases similar briefs were filed.[29] Some of these were so bulky that they ran into several volumes. The danger involved in encouraging this method of presenting facts became rapidly apparent. Whereas Mr. Brandeis' entire brief, including the factual material, had occupied only 113 pages, other counsel were by no means as concise. The maximum was reached in the Consolidated Gas case in which the entire hearings before the master in chancery,[30] relevant and ir-

[28] Louis D. Brandeis, Curt Muller v. Oregon, 208 U. S. (1908) 412, 52 L. ed. 551. Brief for defendant in error (n. d. n. p.), 113 p. Eight pages are devoted to a synopsis of the laws in the various states which limit the hours of women's labor. The legal argument consumes two pages in which but three cases are cited. The remaining pages are devoted to a survey of the benefits, economic, social, and to health, of shorter hours for women workers. His contention was stated as follows: "The facts of common knowledge of which the court may take judicial notice . . . establish, we submit, conclusively, that there is reasonable ground for holding that to permit women in Oregon to work in a 'mechanical establishment, or factory, or laundry' more than ten hours in one day is dangerous to the public health, safety, morals, or welfare." *Ibid.*, p. 10.

[29] Felix Frankfurter and Josephine Goldmark, The Case of the Shorter Work Day, Brief of the Defendant in Error, Bunting v. Oregon, 243 U. S. (1917) 426, 61 L. ed. 830 (N. Y., 1915), 2 Vols.

Felix Frankfurter and Josephine Goldmark, Brief for Defendants in Error, Stettler v. O'Hara, 243 U. S. (1917) 629, 61 L. ed. 937, (n. d. n. p.).

Felix Frankfurter and Josephine Goldmark, Oregon Minimum Wage Cases, Stettler v. O'Hara, 243 U. S. (1917) 629, 61 L. ed. 937. Brief of Defendant in Error upon Re-argument (n. d. n. p.).

Felix Frankfurter, F. H. Stephens and Mary W. Dewson, District of Columbia Minimum Wage Cases, Adkins v. Children's Hospital, 261 U. S. (1923) 525, 67 L. ed. 785. (N. Y., 1922.) Brief of Plaintiff. See also sec. 226.

[30] The device of master in chancery has been frequently used by the

relevant, were presented to the court in twenty-one volumes—over twenty thousand printed pages. If a similar bulk of evidence were presented in every case, it would be impossible for the court to decide more than a few cases each year. For this reason the pressure of judicial business forced the court to rebuke the over-zealous attorneys in that case.[31]

It is not only the danger of irrelevancy in the material presented that has made the court somewhat reluctant to accept the evidence compiled by the attorneys. Such evidence is, of course, partisan and consequently is not as reliable as the court should have.[32] An examination of the cases in which scientific data were material to the determination of the constitutionality of the law, shows how reluctant the court is to accept the evidence presented to them. This attitude has undoubtedly caused a tardy recognition of the true importance of questions of fact in constitutional matters. A careful study of the cases shows,

seems to gathering data for the solution of cases in constitutional law, especially those involving the reasonableness of rates. But the court will not be bound by the decisions of the master. Knoxville v. Knoxville Water Co., 212 U. S. (1909) 1, 53 L. ed. 371; Newton v. Consolidated Gas Co., 258 U. S. (1922) 165, 66 L. ed. 538.

[31] Newton v. Consolidated Gas Co., 258 U. S. (1922) 165, 66 L. ed. 538. The first volume of the record was the transcript. There were seventeen volumes of testimony before the master in chancery and four volumes of exhibits. The accumulation of much irrelevant material and the failure to digest and synopsize the rest were in flat contradiction to rule 85 of the Supreme Court in equity cases. The rebuke of the court to the attorneys is to be found on page 178. The case involved the validity of the gas rate fixed in New York.

[32] This seems to have been the reason for the curious statement of Justice Fox in State v. Cantwell, 179 Md. (1904) 245 at 279, 280, 78 S. W. 500. "Defendants sought to introduce testimony of expert witnesses, tending to show that the underground work contemplated by this act of the legislature was not attended with danger to the health of those engaged in the performance of such work. This testimony was excluded by the court and in our opinion, correctly so. The validity of laws enacted in the exercise of the police power of the state can not be made dependent upon the views of experts as to the necessity of such enactment. If the constitutionality of all laws enacted for the promotion of public health and safety can be assailed in this manner, truly and sadly would it be declared that our laws rest upon a very weak and unstable foundation."

Sometimes, of course, the evidence is very conflicting. Jay Burns Bak. Co. v. Bryan, 264 U. S. (1924) 504, 68 L. ed. 813, is an excellent example. This case is discussed in note 4.

however, that the courts are not averse to the use of scientific *data per se*, but are really working out certain rules of evidence.[33] In the abstract, these rules upon which the courts rely are practically incontestable, and, with the exception of a very few cases to be noted later, are well established in law and are frequently applied.[34]

§ 217. The first of these rules may be stated as follows: The courts consistently refuse to consider evidence of particular cases, when the problem is one of a general situation. This rule has not been used to any considerable extent in classification cases except in those involving the question of classifying numerically by size. Laws applying only to railroads of a given length, industries and mines with a certain number of employees, or cities with more than a stated population, have been upheld.[35] In each of these cases the court refused to consider evidence that a railroad or industry was just over or under the line, because of the difficulty of drawing an exact line of demarcation. Hence when the classification laid down by the legislature is *prima facie* reasonable, the courts will refrain from interfering, and all evidence to controvert it is inadmissible. In this group of cases, therefore, the rule is only another statement of the familiar principle that a

[33] The Minimum Wage cases seem to have been the only instance in which the court has deliberately flouted scientific evidence and every other aid in determining the facts upon which the law was based. Adkins v. Children's Hospital, 261 U. S. (1923) 525, 67 L. ed. 785. To follow this case to its logical conclusion would be to make due process "a pedagogical requirement of the impracticable." Justice Holmes, Dominion Hotel v. Arizona, 249 U. S. (1919) 265 at 268, 63 L. ed. 597.

[34] For a very good summary of the rules underlying the willingness of the courts to take evidence in this class of cases see the note to Pittsburg, C., C. &c. R. Co. v. State, 180 Ind. (1913) 245, 102 N. E. 25, in L. R. A. 1915D, 458.

[35] New York, N. H. &c. R. Co. v. New York, 165 U. S. (1897) 628, 41 L. ed. 853. The law was limited to railroads of over fifty miles of track. Borgnis v. Falk, 147 Wis. (1911) 327, 133 N. W. 209. A workmen's compensation law was limited to industries having over three employees. St. Louis Consol. Coal Co. v. Illinois, 185 U. S. (1902) 203, 46 L. ed. 872. The law was limited to mines with over five employees. McLean v. Arkansas, 211 U. S. (1909) 539, 53 L. ed. 315. The law was limited to mines of ten men. Mason v. Missouri ex rel., 179 U. S. (1900) 328, 45 L. ed. 215. Law classifying cities by size.

"classification having some reasonable basis will not offend against" due process "merely because it is not made with mathematical nicety, or because in practice it results in some inequality."[36] Any evidence to prove either of these things must be considered irrelevant, and will be ruled out by the courts.

The same rule, however, when applied to the problem of the validity of the legislative object, has caused considerable difficulty. The courts consider all evidence beside the point which tends to prove that a given individual so conducts a dangerous business that no harm will result, when the problem is one of the general way in which the industry is conducted. The first important case of this nature was the one involving the validity of legislation prohibiting oleomargarine. Here the court refused to admit evidence that the produce of the defendant was entirely healthy, and this refusal was sustained by the Supreme Court of the United States. The latter pointed out that even though it were conceded that some oleaginous products were not deleterious, the industry as a whole was probably dangerous to public health.[37] The law was not to be sustained or rejected upon its application to an individual producer, but upon the general conditions which prevailed in the industry.[38] This principle has been followed in a very considerable number of cases since 1900,[39]

[36] Lindsley v. Natural Carbonic Gas Co., 220 U. S. (1911) 61, 55 L. ed. 369.

[37] Powell v. Pennsylvania, 127 U. S. (1887) 678, 32 L. ed. 253. It was of evidence of this character that Justice Sutherland declared: "We do not find it convincing." Radice v. New York, 264 U. S. (1924) 292 at 326, 68 L. ed. 1181.

[38] This is the same reasoning which is back of the argument of Justice McKenna in Wilson v. Eureka City, 173 U. S. (1899) 32, 43 L. ed. 603, when he declared that merely because the plaintiff offered to show that his particular use of the street was not dangerous no reason existed why the ordinance giving the mayor the right to refuse permission to use the street for an unusual purpose should be held void.

[39] Petit v. Minnesota, 177 U. S. (1900) 164, 44 L. ed. 716; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. (1907) 251, 52 L. ed. 195; Heath &c. Mfg. Co. v. Worst, 207 U. S. (1907) 338, 52 L. ed. 236; Blinn v. Nelson, 222 U. S. (1911) 1, 56 L. ed. 65; Mutual Loan Co. v. Martell, 222 U. S. (1911) 225, 56 L. ed. 175; Leavitt v. Morris, 105 Minn. (1908) 170, 117 N. W. 393.

and in the last decade has been coupled with the doctrine, to be discussed subsequently, that the legislature is the best judge of the local conditions, and hence their findings of fact must be considered as *prima facie* evidence.[40]

From the point of view of abstract logic, this attitude of the courts seems to represent the negation of the fundamental principle that the courts do not veto legislation, but merely refuse to enforce it in individual cases.[41] The refusal to consider certain evidence relative to these individual cases is, however, a practical and necessary concession to the demands of administrative efficiency. If the courts were to refuse to enforce such laws merely because, in individual cases, they found the public purpose was not served by them, there would be no end to litigation, and the much lamented indefiniteness of the law would be infinitely increased. With the doctrine of *stare decisis* as the foundation of our legal system, the courts would only have added to the confusion which exists between law and facts, had they not laid down some such general rule as has been developed in this line of cases. It is furthermore manifest that the evidence presented to the court is

In considering the constitutionality of a statute limiting the hours of labor of women in hotels the court made the following answer to a plea that the particular hotel in question did not overwork its employees. "The law must be considered in its general application to all cases and conditions existing throughout the state. It must be considered from its application to all employers and employees, and not to any individual employer or employee. If a law of this character must be considered with reference to the particular circumstances and conditions existing in each hotel, it might lead to the absurdity of its being valid in one case and invalid in another. The law is general in its application, embracing all hotels, and is valid as to all or none." People v. Elerding, 254 Ill. (1912) 579 at 587, 98 N. E. 982, 40 L. R. A. (N. S.) 893.

[40] Merely because one pool-hall is orderly is no reason why pool-halls may not be subject to regulations. The amount of disorder is a local matter, of this the legislature is the best judge. Murphy v. California, 225 U. S. (1912) 623, 56 L. ed. 1229. Merely because the plaintiff produced milk which contained no danger from tuberculosis was no reason why he should be exempt from the tuberculin test. Adams v. Milwaukee, 228 U. S. (1912) 572, 57 L. ed. 971. See also Purity Extract & T. Co. v. Lynch, 226 U. S. (1912) 192 at 204, 57 L. ed. 184; Hebe Co. v. Shaw, 248 U. S. (1918) 297 at 300-302, 63 L. ed. 255.

[41] Marbury v. Madison, 1 Cranch (U. S., 1803) 137, 2 L. ed. 60; Adkins v. Children's Hospital, 261 U. S. (1923) 525, 67 L. ed. 785.

not always reliable, and since the judges have no means of checking its accuracy, they might very easily make erroneous decisions of questions of fact with most disastrous results.[42]

It is noteworthy, however, that this rule is not reversible. If the individual at bar comes under the law, he will be held to its obedience even though it might be unconstitutional if applied to other cases. This, of course, has always been tacitly recognized in cases involving such guarantees as the prohibition of *ex post facto* laws,[43] but there seems no good reason why it should not be applied in due process cases as well.[44]

§ 218. The close connection between the doctrine of judicial notice and the policy of the court in refusing to consider certain evidence as binding upon it, is nowhere more clearly shown than in the second rule which they have developed in this regard. Any attempt to introduce evidence of a fact which is obviously not true will be resisted. If an attorney endeavors to introduce evidence

42 This was pointed out by Justice Holmes in Pierce Oil Corp. v. Hope, 248 U. S. (1919) 498, 63 L. ed. 381. Here the oil company proposed to prove that its oil tanks were perfectly safe, but the court said that that made no difference because many of the safest tanks exploded.

43 T. M. Cooley, Treatise on Constitutional Limitations (Boston, 1890), pp. 213, 214.

44 People v. Beakes Dairy Co., 222 N. Y. (1918) 416, 119 N. E. 115; Chicago Dock & Canal Co. v. Fraley, 228 U. S. (1913) 680, 57 L. ed. 1022.

It seems that this is the reason for the persistent willingness of the court to consider evidence that the particular scheme in question was or was not immoral (as fostering gambling) in those cases involving the validity of laws prohibiting trading stamps. Where the evidence shows that there is no gambling feature in the operations of the trading stamp company the law has been held invalid as to that particular company. People v. Gillson, 109 N. Y. (1888) 389, 17 N. E. 343; State v. Ramseyer, 73 N. H. (1904) 31, 58 Atl. 958, 2 Ann. Cas. 445; Denver v. Frueauff, 39 Colo. (1907) 20, 88 Pac. 389, 7 L. R. A. (N. S.) 1131. But where the evidence showed a relation to public morals in a particular scheme the law was enforced. Humes v. Ft. Smith, 93 Fed. (1899) 857.

The courts will likewise accept elaborate evidence in rate-fixing cases with regard to the reasonable or confiscatory nature of the rate. It seems that the rule here has developed for the same reason. If the rate is valid as to the particular utility it must be sustained. An excellent illustration of the care with which technical information will be considered in this class of cases is to be found in Ohio Utils. Co. v. Public Utils. Commn., 267 U. S. (1925) 359, 69 L. ed. 656.

contrary to the ordinary facts of life, such evidence will be considered entirely irrelevant. When it was offered to prove that it was necessary to have barber shops open on Sunday, the court refused to listen;[45] and when a counsel attempted to demonstrate that some locomotives do not give out sparks, the court turned a deaf ear.[46] It can not be doubted that this rule is necessary to prevent overzealous attorneys from wasting the time of the court. By thus taking judicial notice of the facts which are obviously true, the court rules out a whole sphere of evidence which might be presented to it and which might only serve to slow up the wheels of justice.

There is always the danger, however, that the court will take judicial notice of a fact which is debatable. Indeed, if the doctrine were carried to its logical conclusion, the court would seem to be warranted in ruling out all evidence which did not coincide with its own opinion. This result was actually attained in the vaccination cases. The *dicta* in these decisions go so far from the beaten path that one would be tempted to ignore them as a judicial freak, were they not the solemn declaration of two of the most respected of state courts and also the Supreme Court of the United States. For our purposes the two cases may be considered as practically the same. Both attempts to introduce evidence of a scientific nature, tending to prove that vaccination is without value and even dangerous, were frustrated by the deep-seated prejudice of the court as to its value.[47] While it certainly seems, on the face of

[45] State v. Frederick, 45 Ark. (1885) 347, 55 Am. Rep. 555.

[46] Lake Erie &c. R. Co. v. Gossard, 14 Ind. App. (1895) 244, 42 N. E. 818.

[47] Justice Holmes, however, declared that the proofs offered were "more formidable by their number than by their inherent value. . . . What everybody knows the court must know." Jacobson v. Massachusetts, 197 U. S. (1905) 11 at 30, 49 L. ed. 643. This case affirmed Commonwealth v. Jacobson, 183 Mass. (1903) 242, 66 N. E. 719. In re Viemeister, 79 N. Y. (1904) 235.

The decision in these cases was based upon an earlier decision of the Massachusetts court in which the defendant offered to prove the evil effects of vaccination from his personal knowledge. The court rejected this evidence as merely opinion. Of the medical testimony offered, the

things, that compulsory vaccination is a legitimate health measure, it is hard to justify the refusal of the court to consider the facts in the case, when those facts consisted of scientific evidence designed to show that the legislative determination is faulty. The logical result of this reasoning was seen in the Ives case, in Lochner v. New York, and in the Minimum Wage Cases where the courts found their deep-seated prejudice opposing most beneficial statutes which consequently fell under the judicial axe.[48]

§ 219. The third rule may be stated as follows: Evidence will not be considered conclusive unless it applies to all the points at issue. Although some evidence was presented in favor of the New York tenement house law, the court refused to regard it as conclusive because it did not cover the entire ground.[49] The storm of protest which

court declared it was of doubtful validity. Justice Knowlton took judicial notice of the fact "that for nearly a century most . . . of the medical profession have regarded vaccination repeated after intervals, as a preventive of smallpox; that while they have recognized the possibility of injury to an individual from carelessness in the performance of it, or even in a conceivable case without carelessness, they generally have considered the risk of such an injury too small to be seriously weighed as against the benefits coming from the discreet and proper use of the preventive; and that not only the medical profession and the people generally have for a long time entertained these opinions, but legislatures and courts have acted upon them with general unanimity. If the defendant had been permitted to introduce such expert testimony as he had in support of these several propositions, it could not have changed the result." Commonwealth v. Pear, 183 Mass. (1903) 242 at 247, 66 N. E. 719. It is obviously a long step from the sort of evidence presented in this case to that presented in the later vaccination cases.

The tendency to abuse this rule is likewise evidenced by a considerable number of other cases. State v. Main, 69 Conn. (1897) 123 at 135, 37 Atl. 80; Morris v. Columbus, 102 Ga. (1892) 792, 30 S. E. 850; State v. Hay, 126 N. Car. (1900) 999, 35 S. E. 459; Laurel Hill Cemetery v. San Francisco, 216 U. S. (1909) 358, 54 L. ed. 515.

[48] Ives v. South Buffalo R. Co., 201 N. Y. (1911) 271 at 287, 295, 94 N. E. 431; Lochner v. New York, 198 U. S. (1905) 45, 49 L. ed. 937; Adkins v. Children's Hospital, 261 U. S. (1923) 525, 67 L. ed. 785.

[49] This law prohibited the manufacture of cigars in tenements. Evidence was offered to show the deleterious effect upon the inhabitants of the tenements of the manufacture of tobacco in their rooms. It was pointed out, however, that the law covered cases where there could be no possible deleterious effect, as was indeed the fact in the case before the court for there a separate room was used for the cigar-making. In re Jacobs, 98 N. Y. (1885) 98. It will be noted that this case is one of the few where judicial notice is taken of the fact that the law is unjust in the individual

this case evoked showed the court the difficulty of the rule, and not until the twentieth century attitude toward constitutional questions had become firmly established was it revived. The rule is obviously illogical when applied to the efforts of those who wish to introduce evidence to support a statute or state action. It has long been established, that if the action of the state can be sustained under any one of the objects of the police power, or indeed under any reasonable state of facts, the courts must uphold the law.[50] To refuse testimony because it does not meet the court's preconceived view of the particular object of the police power which the statute serves, is to take an arbitrary view of the whole matter. Fortunately, this view has fallen into disuse.

There seems no good reason, however, for not applying the rule to those who would attack the constitutionality of the act. If the act is to fall it must be because no reasonable state of facts can sustain it, or because it has reference to none of the legitimate objects of police regulation. He who would seek to overthrow legislative action must come prepared to bear the burden of proof, and if he can not prove all the angles of his case, it is hard to see why the court should waste its time considering any of them.[51] This was shown very clearly in the case of Frank v. Mangum. The complainant claimed that he was convicted as the result of the intimidation of the judge and the jury and asked redress of the United States Supreme Court against the procedure which he claimed violated due process of law. Justice Pitney pointed out however, that even though the accused had been convicted by a court under

case and so is contrary to the trend of legal reasoning as was pointed out in sec. 217.

[50] 12 *Corpus Juris*, pp. 791-800, secs. 221-226. See especially p. 798, sec. 222.

[51] As a corollary to this rule it follows that evidence which would not affect the question of constitutionality may properly be excluded. Such was the case in Reynolds v. United States, 98 U. S. (1878) 145, 25 L. ed. 244; Commonwealth v. Has, 122 Mass. (1877) 40; Commonwealth v. Connelly, 163 Mass. (1895) 539, 40 N. E. 862; Commonwealth v. Pear, 183 Mass. (1903) 242 at 247, 66 N. E. 719.

fear of mob violence, a procedure which certainly did not give him due process, he had received adequate process in the subsequent appeals which he had taken to the higher courts of the state. In the decision of his case by these tribunals, there had been no extraneous pressure. His proof of mob violence was, therefore, entirely beside the point, because it could be admitted and yet he would have no case in which the federal Supreme Court would be bound to step in.[52]

The same rule applied in the upholding of the Indiana statute making the workmen's compensation law compulsory only for coal mines, while it remained optional for other industries. The court quite properly held that evidence that there were other industries fully as dangerous as that of mining was entirely beside the point. The real question at issue was whether a condition existed in the coal-mining industry which would warrant making the law compulsory for it. The admitted facts, that mining was dangerous and that the mine owners had refused to take the insurance on an optional plan, satisfied the court that the coal-mining industry was sufficiently dangerous and sufficiently different to warrant this special law regarding them. In short, the question of relative danger was merely one of the bases upon which the classification might be justified. To prove but one of the sides of the argu-

[52] Frank v. Mangum, 237 U. S. (1914) 309, 59 L. ed. 969. More recently a much more flagrant case was presented in which facts, admitted on demurrer, indicated that the accused had not been given any real judicial trial. Furthermore, the corrective process of the state appellate courts was obviously inadequate. Justice Holmes declared: "We assume in accordance with that case, [Frank v. Mangum, 237 U. S. (1914) 239, 59 L. ed. 969], that the corrective process supplied by the state may be so adequate that interference by *habeas corpus* ought not to be allowed. It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way. But if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the state courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing to the petitioners their constitutional rights." Moore v. Dempsey, 261 U. S. (1923) 86 at 91, 67 L. ed. 543.

ment the court held, was not enough to condemn the law.[53] It will be seen that this attitude fits in admirably with the modern position of the court toward the legislative determination of facts, which will be dealt with in a subsequent section.[54]

§ 220. Closely connected with the doctrine that the court will consider only complete evidence from those who would attack a law is the rule that it is useless to present evidence to prove a statute does or does not serve an unrecognizable object of the police power. At first glance one would think that such an obvious rule would surely cause no difficulty. Yet perhaps no principle applied to questions of fact in due process cases has caused more criticism of the judiciary than this one. An examination of the cases which have been most criticised will show that the cause of the objections is rather that the critics consider the doubtful object of police regulations should be recognized than that evidence should be admitted to support a doubtful purpose. Much of the discussion of the New York bakery case is to this point.[55] Very inadequate evidence was submitted to the court in this case, but such evidence as was offered did not cover the question of the health of the general public at all. The court, in spite of the ruling in Holden v. Hardy a decade before,[56] was not

[53] Lower Vein Coal Co. v. Industrial Bd. of Ind., 255 U. S. (1921) 144, 65 L. ed. 555.

[54] Briefly, this position is that the legislature is to determine the means and extent of the police power, within reasonable limits. "Without undertaking to affirm or deny their [cigarettes] evil effects, we think it within the province of the legislature to say how far they may be sold, or to prohibit their sale entirely, after they have been taken from the original packages or have left the hands of the importer, provided no discrimination be used as against such as are imported from other states, and there is no reason to doubt that the act in question is designed for the protection of the public health." Justice Brown, Austin v. Tennessee, 179 U. S. (1900) 343 at 348, 399, 45 L. ed. 224. See also New York ex rel. v. Van de Carr, 199 U. S. (1905) 552, 50 L. ed. 305; Fischer v. St. Louis, 194 U. S. (1904) 361, 48 L. ed. 1018; Rosenthal v. New York, 226 U. S. (1912) 260, 57 L. ed. 212; L'Hote v. New Orleans, 177 U. S. (1900) 567, 44 L. ed. 904; Jay Burns Baking Co. v. Bryan, 264 U. S. (1924) 504, 68 L. ed. 813. See secs. 221-232.

[55] Lochner v. New York, 198 U. S. (1905) 45, 49 L. ed. 937.

[56] 169 U. S. (1898) 366, 42 L. ed. 780.

prepared to state that an act which protected merely the health of the worker was a measure for the public health. A decade later the court declared the object of the statute not a legitimate one if it was passed merely to raise the efficiency of the workers. Hence evidence that it increased their productiveness was inadmissible.[57] The chief difference between the cases from the point of view of this rule seems to be that, in point of law, the ruling that the health of the workers is not public health was illogical, while the ruling that industrial efficiency was not a legitimate object of police regulation was based on sound legal principles. In view of this, one is not surprised that the former case should have received much more severe criticism than the latter.

In spite of these difficulties, it must be recognized that the principle is firmly established and frequently used. In the case of a negro zoning ordinance the court held that evidence to prove that negroes depreciate property was inadmissible because the police power of the state could not be used merely to sustain property values, especially when the depreciation was due to the kind of neighbors moving in next door.[58] In line with this decision was the one that the police power can not be used to force a railroad to make improvements, outside the regular scope of its business, merely because such improvements will increase its traffic.[59] But the difficulty of applying this rule has not disappeared. In the Washington employment agency case it was again unfortunately tied to a well recognized object of the police power. The court declared

[57] Coppage v. Kansas, 236 U. S. (1914) 1, 59 L. ed. 441. However, it should be noted, as pointed out by the dissenting justices (Day and Hughes), that the statute could be justified on the ground that it promoted industrial peace. It seems, however, that there was no evidence on that point offered to the court.

[58] Buchanan v. Warley, 245 U. S. (1917) 60, 62 L. ed. 149.

[59] Great Northern R. Co. v. Cahill, 253 U. S. (1920) 71, 64 L. ed. 787. The railroad commission of North Dakota ordered the plaintiff in error to install cattle scales at one of its stations. Evidence that the cattle scales would increase the business of the railroad company was declared irrelevant by Chief Justice White, the determining point being whether scales were a regular part of the railroad equipment or not.

that it could not take the time to consider evidence of abuses in every occupation and the police power could hardly be used to prohibit all vocations because of abuses in them. In this reasoning the court missed the cardinal point, namely, that the police power could be used to regulate, or even destroy, those occupations or professions which were subject to enough abuse to make their conduct dangerous to the public welfare. The question of what is enough abuse is one of fact, and for this reason, to rule out evidence on the central fact in the case seems unwarranted.[60]

[60] Unfortunately the court neglected to place its decision in this case upon a very simple and logical ground which was practically obvious, but preferred rather to bring it by sheer force under a rule where it did not naturally belong. Inasmuch as other more lenient measures of regulating the abuses had not been tried in Washington, the court might very well have held that to abolish in a sweeping manner the entire employment agency business was unwarranted. Certainly if there are two methods of dealing with the situation, one of which is questionable and the other untried, the court may reject the doubtful one until it be seen if the less drastic one is not as effective. There seems to have been little evidence given the court on this point. Adams v. Tanner, 244 U. S. (1917) 590, 61 L. ed. 1336.

CHAPTER XXV.

LEGISLATIVE DETERMINATION OF FACTS AND JUDICIAL TECHNIQUE.

§ 221. There is an unmistakable tendency of the court, in recent years, to uphold state statutes if any reasonable basis for them can possibly be found. There has been some evidence of a trend in this direction for many years, but it has been only within the last decade and a half that the new movement has gained considerable strength. Not until the past few years, indeed, has it been recognized by critics of the court.[1]

The sources of the movement seem to be two. In the first place, it is a direct outgrowth of the well recognized rule that laws should be upheld unless they were clearly unconstitutional.[2] This principle was so firmly imbedded in our constitutional system by the last quarter of the nine-

[1] A. M. Kales, "New Methods in Due Process Cases," Amer. Political Science Rev., Vol. XII (May, 1918), p. 241, does not recognize this movement. Louis Brandeis, "The Living Law," Ill. L. Rev., Vol. X (1915), p. 461, makes a plea for the tendency but seems hardly to recognize it. R. E. Cushman, "Social and Economic Interpretation of the Fourteenth Amendment," Mich. L. Rev., Vol. XX (May, 1922) 535, seems to be the first writer to fully recognize the new trend.

[2] Cooley, Constitutional Limitations, pp. 216-218. "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." Chief Justice Waite, Sinking Fund Cases, 99 U. S. (1879) 700 at 718, 25 L. ed. 496. Cited with approval and comment by Justice Harlan in Powell v. Pennsylvania, 127 U. S. (1887) 678, 32 L. ed 253. See also Livingston Co. v. Darlington, 101 U. S. (1879) 407, 25 L. ed. 1015; McCabe v. Atchison T. & S. F. R. Co., 235 U. S. (1914) 151, 159 L. ed. 169; Davis v. Florida Power Co., 64 Fla. (1912) 246, 60 So. 759; Padelford, Fay & Co. v. Savannah, 14 Ga. (1854) 438; Commonwealth v. International Harvester Co., 131 Ky. (1909) 551, 115 S. W. 703; Richman v. Consolidated Gas Co., 186 N. Y. (1906) 209, 78 N. E. 871.

teenth century that even the strong development of a contrary doctrine in regard to due process cases could not uproot it.[3] A second source of this viewpoint is to be found in the old doctrine of the common law that the court can take a case from the jury when the latter renders a decision that could not possibly be given by any reasonable thinking person.[4] Under the new interpretation of due process of law, the courts are approaching the attitude that they will not interfere with the legislative discretion in any case where it is conceivable that a reasonable man could agree with the legislature.

§ 222. This movement first developed in classification cases. Probably the earliest cases containing an intimation of this tendency were those involving regulations of local matters. In 1885, it was stated in two United States Supreme Court decisions that the municipality could make such local regulations governing its laundries as seemed necessary,[5] and that these would be upheld unless the clearest sort of arbitrary discrimination existed.[6] The court pointed out that it could not possibly be as familiar with the local conditions as the municipal council. This doctrine was not transferred from local ordinances to state-wide laws for several years. Thus, a monopoly law which exempted producers of agricultural products was declared to be discriminatory; and even the dissent contains hardly an intimation that the legislative determina-

[3] The reaction against this doctrine caused the court much criticism. It forms the basis of the argument of A. M. Kales, Unpopular Government in the United States (Chicago, 1914), ch. XVII; G. E. Roe, Our Judicial Oligarchy (N. Y., 1912), ch. III. The stages in the development and the general attitude of the court are discussed by R. E. Cushman, "Interpretation of the Fourteenth Amendment." Mich. L. Rev., Vol. XX (May, 1922), p. 737; "Constitutional Decisions by a Bare Majority of the Court." Mich. L. Rev., Vol. XIX (June, 1921), p. 771.

[4] Blackstone, Commentaries on the Laws of England, Vol. IV, p. 361. The development of the common law in this respect is carefully traced in J. B. Thayer, Preliminary Treatise on Evidence (Boston, 1898), ch. IV.

[5] Soon Hing v. Crowley, 113 U. S. (1885) 703 at 708, 28 L. ed. 1145; Barbier v. Connolly, 113 U. S. (1885) 27 at 30-32, 28 L. ed. 923.

[6] Yick Wo v. Hopkins, 118 U. S. (1885) 356, 30 L. ed. 220. Cf. Chicago v. Netcher, 183 Ill. (1899) 104, 55 N. E. 707.

tion of a classification question should be presumptively final.[7]

The court understood the nature of monopolies better than many other things, but when questions of local concern, or matters dependent entirely upon local conditions, began to come to it, there was perforce a tendency to give greater weight to the legislative determination. The California option law forbidding trading on futures in corporation stocks,[8] and the Missouri law placing a special penalty on railroads which did not dispose of Johnson grass on their right of way before it seeded, were two of the first state statutes upheld for this reason.[9]

The leaven injected in these two cases by Justice Holmes only gradually had any visible effect upon the other members of the court.[10] Although Chief Justice Fuller declared in 1910 that the legislature could forbid certain kinds of soliciting on trains because it was most familiar with the kinds which were most annoying in that locality,[11] it was not until the year following that there were unmistakable signs that the *dicta* of Holmes was becoming the law. Justice Van Devanter, in the case of Lindsley v. Natural Carbonic Gas Company, stated the famous four rules which govern the decisions of the court in classification cases. The fourth of these was, "One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." He, furthermore, made it very clear that since the counsel in that case had failed

[7] Connolly v. Union Sewer Pipe Co., 184 U. S. (1902) 540, 46 L. ed. 679.

[8] The court, per Justice Holmes, took judicial notice that trading in these stocks was perhaps most apt to cause gambling. "With regard to the objection that this provision strikes at only some, not all, of the objects of possible speculation, it is enough to say that probably in California the evil ought to be stopped was confined in the main to stocks in corporations." Otis and Gassman v. Parker, 187 U. S. (1903) 606 at 610, 47 L. ed. 323.

[9] Missouri, K. &c. R. Co. v. May, 194 U. S. (1904) 267, 48 L. ed. 971.

[10] See, however, State v. Cantwell, 179 Mo. (1904) 245, 78 S. W. 569, affirmed Cantwell v. Missouri, 199 U. S. (1905) 602, 50 L. ed. 329.

[11] Williams v. Arkansas, 217 U. S. (1910) 79 at 89, 90, 54 L. ed. 673.

to carry that burden he must lose the decision.[12] Three years later, Justice Day, in regard to classification of coal mines,[13] Justice McKenna, in regard to grading theatre license fees according to the prices charged at the door,[14] and Justice Holmes, in regard to regulations applying only to corporations, took similar attitudes.[15]

§ 223. In each of these cases, however, obvious reasons occurred to the court which would justify the legislature in making the distinctions found in the act. In most of them, moreover, those reasons had been urged by the attorneys and not infrequently they were incorporated in the decisions. In 1913, however, the Chicago Dock Company case brought the matter squarely before the court. The legislature had required protections around openings used for hoisting materials in the course of building construction, but not for other openings. In disposing of this case Justice McKenna discarded all hypothetical reasons for the classification and declared that the matter was one for legislative determination, unless it could be clearly shown that the law was entirely unreasonable and arbitrary in its effects upon the complainant.[16] These views

[12] Lindsley v. Natural Carbonic Gas Co., 220 U. S. (1911) 61, 55 L. ed. 369. He still clung to the time-honored doctrine of judicial notice and declared that where the classification is within the range of common judicial knowledge its viciousness need not be proved. In many respects this case represents a curious blending of the new and the old.

[13] The statute required the entrance to a bituminous mine (but not to a block coal mine) to be four feet wider than the car. This was upheld on the ground that the legislature had a wide discretion in matters concerning local conditions. Barrett v. Indiana, 229 U. S. (1913) 26, 57 L. ed. 1050.

[14] Metropolis Theater Co. v. Chicago, 228 U. S. (1913) 61, 57 L. ed. 730.

[15] "If the legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their state, and that there was no other case of frequent occurrence where the same could be said, we can not review their economics or their facts." Central Lumber Co. v. South Dakota, 226 U. S. (1912) 157 at 161, 57 L. ed. 164.

[16] He declared that the question was one of the degree of danger involved and that the legislature could without doubt make a classification on the basis of degree. "Who is to judge of the danger, whether absolutely considered or comparatively considered? Is it a matter of belief or proof? If of belief, we should be very reluctant to oppose ours to that of the legislature of the state, informed, no doubt, by experience, of conditions,

were reiterated the following year by the same justice in the Harvester case, which forms a striking contrast to the earlier monopoly case of 1902.[17] These cases mark a turning point in that they not only establish the doctrines that legislative discretion is given a wide presumptive range in classification matters, but they likewise point out that whoever would attack the classification of a statute must show first, that it is an arbitrary discrimination in general, and second, that its arbitrariness works a deprivation of his particular rights.

§ 224. It remained for the court to throw over unequivocally its efforts to find a reasonable basis on which to justify the legislative classification. As long as the legislative judgment was but supplementary to their own, the logical conclusion of this line of cases was yet to be reached. It is not surprising then, to find Justice Pitney's clear cut declaration in 1919 that "The burden being upon

and fortified by presumptions of legality, and confirmed, besides, by the opinion of the Supreme Court of the state. . . . If of proof, there is none in the record. There are assertions by counsel, and considering alone the openings necessary for hoisting machinery and the openings for stairs and other openings, an employee or materials can be imagined as falling through one of them with the same ease as he or the materials can fall through the others. But other things must be taken into account. The setting of the openings must be considered, the varying relations of the employees to them, and other circumstances. The legislation can not be judged by abstract or theoretical comparisons. It must be presumed that it was induced by actual experience, and New York, it is said, has been induced by a like experience to enact like legislation. If it be granted that the legislative judgment be disputable or crude, it is notwithstanding, not subject to judicial review. We have said many times that the crudities or even the injustice of state laws are not redressed by the Fourteenth Amendment.

"The law may not be the best that can be drawn, nor accurately adapted to all the conditions to which it was addressed. It may be that it would have been more complete if it had gone farther and recognized and provided against the danger that all uninclosed openings in a building might cause, and should not have distinguished between hoists inside of a building and those outside; but we do not see how plaintiff in error is concerned with the omissions." Justice McKenna, Chicago Dock & Canal Co. v. Fraley, 228 U. S. (1913) 680, 57 L. ed. 1022.

[17] Connolly v. Union Sewer Pipe Co., 184 U. S. (1902) 540, 46 L. ed. 679. The chief difference between the cases was that in the earlier one the farmers' organizations were exempted, while in the later one the law did not apply to labor unions. International Harvester Co. v. Missouri, 234 U. S. (1914) 199, 58 L. ed. 1276.

him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subject to criticism."[18] That this doctrine is more than *dicta* is evident from the fact that it was reiterated by different justices in four subsequent cases.[19] The state courts have also widely recognized the principles that the legislature is presumed to be familiar with the local conditions; that those conditions led them to pass the law under question; that the classifications thus made are presumed to be valid unless it is clearly shown that they are arbitrary; and even that they will be sustained if any state of facts can be reasonably supposed to uphold them.[20]

[18] A workmen's compensation act exempted employers of less than five men and certain classes of employers entirely. It is noteworthy, however, that after the sentence just quoted Justice Pitney added: "But in this case adequate grounds are easily discerned . . ." and proceeded to state them. The whole case is built upon the strong presumption that the legislature knows the local facts and needs of the people better than the court can possibly know them. Middleton v. Texas Power & Light Co., 249 U. S. (1919) 152 at 158, 63 L. ed. 527.

[19] "The only question is whether we can say on our judicial knowledge that the legislature of Arizona could not have had any reasonable ground for believing that there were such public considerations for the distinctions made by the present law. The deference due to the judgment of the legislature on the matter has been emphasized again and again. Hebe Co. v. Shaw, 248 U. S. 297, 303, 63 L. ed. 255. Of course, this is especially true when local conditions may affect the answer, conditions that the legislature does but that we can not know." Justice Holmes in upholding a law exempting women working in railroad restaurants from the general eight-hour day. Dominion Hotel Co. v. Arizona, 249 U. S. (1919) 265, 63 L. ed. 597. Cited approvingly by Justice McKenna in Perley v. North Carolina, 249 U. S. (1919) 510, 63 L. ed. 735.

"But the record fails to show similarity of situation and conditions. In the absence of arbitrary action the making of this assessment upon the district as constituted will be presumed to have been warranted by the circumstances of the case." Justice Day, upholding the ruling of the local authorities which included one cemetery within the assessment district for sewer improvements although other cemeteries were excluded. Mt. St. Mary's Cemetery Assn. v. Mullins, 248 U. S. (1919) 501 at 505, 63 L. ed. 383. See also, Arizona Copper Co. v. Hammer, 250 U. S. (1919) 400, at 433-436, 63 L. ed. 1058; United States v. Standard Brewery, 251 U. S. (1920) 210, 64 L. ed. 209.

[20] People ex rel. v. Murray, 149 N. Y. (1896) 367, 376, 44 N. E. 146; Ex parte King, 157 Cal. (1910) 161, 106 Pac. 578; People ex rel. v. Sacramento Drain. Dist., 155 Cal. (1909) 373, 103 Pac. 207; Durand v. Dyson, 271 Ill. (1916) 382, 111 N. E. 143; People v. Elerding, 254 Ill. (1912) 579, 98 N. E. 982; Eckerson v. Des Moines, 137 Iowa (1908) 452, 115 N. W.

It can not be said, however, that the courts have completely given over the entire control of classification questions to the legislature. The Truax case[21] shows that the judiciary still retains an important function in declaring an act unconstitutional as a violation of equal protection of the law, if the classification is arbitrary.[22] In this case, indeed, the court went rather fully into the facts (which were admitted on demurrer) in order to point out the unfairness of the discrimination. The rule of the court seems to be, therefore, that the attorney contesting the validity of the law must show beyond any reasonable doubt that, first, there can be no possible state of facts to which the law might be addressed in which it would be a reasonable classification, and second, that the injury to the complainant, due to this classification, is not imaginary or sentimental, but a direct, vital violation of his rights.

§ 225. The first important statement of the principle that the legislature should decide the scope of the police power was probably made by Justice Cooley in his Constitutional Limitations, first published in 1868.[23] His words were allowed to lie practically unnoticed by the courts for nearly a half century. Nevertheless, they together with an obscure *dictum* of Justice Peckham in the Fallbrook

177; Roby v. Sheppard, 42 W. Va. (1896) 286, 26 S. E. 278; McGarvey v. Swan, 17 Wyo. (1908) 120, 96 Pac. 697; Ruggles v. State, 120 Md. (1913) 553, 87 Atl. 1080; State v. Dodd, 51 Mont. (1915) 100, 149 Pac. 481; State ex rel. v. Ackerly, 69 Fla. (1915) 23, 67 So. 232; Nolen v. Riechman, 225 Fed. (1915) 812; Bruce v. Gainesville, 183 S. W. (Tex. Civ. App., 1916) 41.

[21] Truax v. Corrigan, 257 U. S. (1921) 312, 66 L. ed. 254.

[22] There seems, therefore, little warrant for going as far as does Justice Hough in Marcus Brown Hold. Co. v. Feldman, 269 Fed. (1920) 306 at 318.. "If the power of classification by legislatures was ever judicially limited, the effort has been abandoned, unless some limitation can be found in the statement that a distinction is arbitrary where no 'state of facts reasonably can be conceived that would sustain it.'"

[23] "But what is for the public good and what are public purposes and what does properly constitute a public benefit, are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which can not be controlled by the courts, except, perhaps, where its action is clearly evasive, and where under pretense of lawful authority, it has assumed to exercise one that is unlawful." T. M. Cooley, Constitutional Limitations (6th ed., Boston, 1890), pp. 153, 154.

Irrigation case (1896),[24] form the foundation of the doctrine of legislative determination of facts in questions concerning legitimacy of the legislative object.[25]

§ 226. The first group of cases to follow this line of development are exceedingly unsatisfactory. This grew out of the failure of the court to appreciate the value of scientific evidence. The viewpoint of the judges appeared to be that unless they were to be able to take judicial notice of the fact that the legislature had acted both reasonably and accurately, they could not sustain the law. This tended to produce two evils. First, the court was placed in a position where, it had to hazard a guess in each case on the correctness of the legislative decision that the conditions warranted the law. This resulted in striking inconsistencies, due to the individual temperaments of the courts. Thus the United States Supreme Court upheld an eight-hour day for miners,[26] but turned down a ten-hour day for bakery workers;[27] and most of the state courts upheld workmen's compensation laws,[28] while the New

[24] "The people of California and the members of her legislature must, in the nature of things, be more familiar with the facts and circumstances which surround the subject, and with the necessities and occasion for the irrigation of the lands, than can any one be who is a stranger to her soil. This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of the facts which surround the subject in their own state. For these reasons, while not regarding the matter as concluded by these various declarations, and acts and decisions of the people and legislature and courts of California, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the deliberate judgment and matured thought of the courts of that state on this question." Fallbrook Irr. Dist. v. Bradley, 164 U. S. (1896) 112 at 160, 41 L. ed. 369.

[25] There were a few other statements of the doctrine about the same time. "The legislature in determining upon the passage of the law may make investigations which the court can not." People v. Smith, 108 Mich. (1896) 527, 66 N. W. 382. See also Morris v. Columbus, 102 Ga. (1897) 792, 30 S. E. 850; State v. Main, 69 Conn. (1897) 123, 37 Atl. 80. Occasionally the original sources of the doctrine are cited. State v. Crowe, 130 Ark. (1917) 272, 197 S. W. 4 at 7.

[26] Holden v. Hardy, 169 U. S. (1898) 366, 42 L. ed. 780.

[27] Lochner v. New York, 198 U. S. (1905) 45, 49 L. ed. 937.

[28] Borgnis v. Falk Co., 147 Wis. (1911) 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489; State ex rel. v. Creamer, 85 Ohio St. (1912) 349, 97 N. E.

York court in one of the earlier decisions on the subject turned it down.[29]

Second, the courts tended to neglect the doctrine that the law must be clearly outside the scope of legislative power before it can be held void. They upheld a law prohibiting the waste of gas and oil only after it had been proved that all wells drew on a common reserve.[30] An act prohibiting intermarriage of epileptics or imbeciles was upheld when it was proved to the satisfaction of the court that such weaknesses were hereditary.[31] The screening laws, regulating the payment of wages in coal mines, was upheld because the court was presented with a report of the National Industrial Commission which showed that screens were frequently used to defraud the workers.[32] Even the Oregon ten-hour day for women was upheld only after Mr. Louis Brandeis had presented a careful brief showing the harmful effects of long hours on the health of women and children.[33] In this attitude there was some justification for the statement of Professor Kales that "the principle burden of the argument falls upon the counsel supporting the act."[34]

602; In re Opinion of the Justices, 209 Mass. (1911) 607, 96 N. E. 308; State ex rel. v. Clausen, 65 Wash. (1911) 156, 117 Pac. 1101.

[29] Ives v. South Buffalo R. Co., 201 N. Y. (1911) 271, 276, 94 N. E. 431.

[30] Ohio Oil Co. v. Indiana, 177 U. S. (1900) 190, 44 L. ed. 729.

[31] Gould v. Gould, 78 Conn. (1905) 242, 61 Atl. 604.

[32] McLean v. Arkansas, 211 U. S. (1909) 539, 53 L. ed. 315.

[33] Muller v. Oregon, 208 U. S. (1908) 412, 52 L. ed. 551. Similar briefs were filed in a very considerable number of subsequent cases. Ritchie & Co. v. Wayman, 244 Ill. (1910) 509, 91 N. E. 695; Hawley v. Walker, 232 U. S. (1914) 718, 58 L. ed. 813; Miller v. Wilson, 236 U. S. (1915) 373, 59 L. ed. 628; Bosley v. McLaughlin, 236 U. S. (1915) 385, 59 L. ed. 632; Stettler v. O'Hara, 69 Ore. (1914) 519, 139 Pac. 743; 243 U. S. (1917) 629, 61 L. ed. 937; People v. Charles Schweinler Press, 214 N. Y. (1915) 395, 108 N. E. 639. See sec. 216.

[34] A. M. Kales, "New Methods in Due Process Cases," American Political Science Review, Vol. XII (May, 1918) 242. The Illinois court declared that it "must be able to see, in order to hold that a statute or ordinance comes within the police power, that it tends in some degree toward the prevention of offenses or the preservation of the public health, morals, safety, or welfare. It must be apparent that some such end is the one actually intended and that there is some connection between the provisions of the law and such purpose." Justice Carter, People v. Weiner, 271 Ill. (1915) 74 at 78, 79, 110 N. E. 870, L. R. A. 1916C, 775, Ann. Cas.

Occasionally the court talked about the high value it placed upon the legislative determination of facts, but it was evident that such statements are to be found only in those cases where it had decided that the law was valid because it was in accordance with the judge's own deep seated convictions and stock of judicial knowledge.[35] Consequently, in practice this system of judicial guessing resulted in the substitution of judicial for the legislative determination of the wisdom of the law, because the courts invariably made their guesses on the basis of long-standing prejudices, which might or might not have any relation to the facts.

§ 227. But a new doctrine had been growing up which was to burst into full bloom in the second decade of the nineteenth century. It became increasingly evident to careful observers that if a court was to judge the validity of the legislative object, it must have some means of knowing the facts in the situation. Frequently these facts were local, and for the courts to have an understanding of local situations seems almost impossible. As far back as 1855 this had been recognized in upholding a delegation of unregulated discretion,[36] and it is clear that the peculiarity of

1917C, 1065. Other cases showing the same tendency are: Minnesota v. Barber, 136 U. S. (1890) 313, 320, 34 L. ed. 455; State v. Boone, 84 Ohio St. (1911) 346, 95 N. E. 924, 39 L. R. A. (N. S.) 1015, Ann. Cas. 1912C, 683; Wyeth v. Thomas, 200 Mass. (1909) 474, 86 N. E. 925, 23 L. R. A. (N. S.) 147, 128 Am. St. 439; Pittsburgh, C., C. & St. L. R. Co. v. State, 180 Ind. (1913) 245, 102 N. E. 25, L. R. A. 1915D, 458.

This attitude was revived in Adkins v. Children's Hospital, 261 U. S. (1923) 525, 67 L. ed. 785, in which Justice Sutherland declared that because many states had adopted a minimum wage law was no justification for the law in the District of Columbia. He pointed out that thrice as many states had refused to adopt it.

[35] Instances of this are to be found in Holden v. Hardy, 169 U. S. (1898) 366, 42 L. ed. 780; Lochner v. New York, 198 U. S. (1905) 45, 49 L. ed. 937 (dissenting opinion of Justice Harlan); State v. Shorey, 48 Ore. (1906) 396, 86 Pac. 881; In re Opinion of the Justices, 234 Mass. (1920) 597, 127 N. E. 525.

[36] State v. Noyes, 30 N. H. (1855) 279. The statute gave the city power to forbid bowling alleys. In this case the ordinance forbade bowling within twenty rods of dwellings, stores, shops, and churches, and declared them to be nuisances if so located. The court pointed out that the fact of the nuisance depended upon when, where, and how the alleys were conducted, and consequently such matters might be left to the city.

local conditions influenced the court in the Fallbrook Irrigation case.[37] The laws prohibiting the sale of stocks or grain on futures were both upheld largely because of the peculiarity of local conditions.[38] Indeed the inherent difficulty of a tribunal at Washington giving an accurate judgment in cases involving labor conditions in distant states, was so universally recognized that it was even mentioned by an English writer.[39]

It was not until the second decade of the century, however, that we find the doctrine specifically applied in any considerable number of cases. In 1912 the court refused to go behind the legislative determination of the necessity of pool-hall regulation,[40] or regulations of competition to prevent unfair practices,[41] largely because in each of these

[37] Fallbrook Irr. Dist. v. Bradley, 164 U. S. (1896) 112, 41 L. ed. 369.

[38] In the case of sale of grain on futures the court took judicial notice that local conditions frequently differed and hence it could not "say from any facts judicially known to the court, or from the evidence in this case, that the prohibition of options to sell grain at a future time, has in itself, no reasonable relation to the suppression of gambling grain contracts . . ." Booth v. Illinois, 184 U. S. (1902) 425, 46 L. ed. 623. See also Otis & Gassman v. Parker, 187 U. S. (1903) 606, 47 L. ed. 323, and New York ex rel. v. Hesterberg, 211 U. S. (1908) 31, 53 L. ed. 75.

[39] Sir Frederick Pollock in commenting on Lochner v. New York, 198 U. S. (1905) 45, 49 L. ed. 937, declared, "The legal weakness of this reasoning if we may say so, is that no credit seems to be given to the state legislature for knowing its own business, and it is treated like an inferior court which has to find affirmative proof of its competence. How can the Supreme Court at Washington have conclusive judicial knowledge of the conditions affecting bakeries in New York. If it has not such knowledge as matter of fact, can it be matter of law that no conditions can be reasonably supposed to exist which would make such an enactment, not necessarily wise or expedient (for no one attributes to any court, state or federal, a general jurisdiction to review legislation on the merits) but constitutional." "The New York Labour Law and the Fourteenth Amendment," Law Quarterly Review, Vol. XXI (July, 1905), pp. 211, 212.

[40] Murphy v. California, 225 U. S. (1912) 623, 56 L. ed. 1229. The statute prohibited pool-halls. The court refused to take up the question of whether pool-halls were detrimental to public morals declaring that that was for the legislature to decide and "the courts can not go behind their finding and inquire into local conditions."

[41] Central Lumber Co. v. South Dakota, 226 U. S. (1912) 157, 57 L. ed. 164. The statute prohibited sales at one place at a lower figure than at another where the purpose was to drive out competitors.

Justice Holmes declared: "We must assume that the legislature of South Dakota considered that people selling in two places made the prohibited use of their opportunities and that such use was harmful, although the usual efforts of competitors were desired. It might have been argued

cases the local conditions were the determining elements. Two years later, the court laid down the doctrine that, as in the classification cases, the burden of proof rested on those who attacked the validity of the object,[42] and the following year Justice Hughes declared that if the matter was "debatable, the legislature is entitled to its judgment."[43]

§ 228. These cases established the law, and in the next five years it was applied in a considerable number of instances. The doctrine was affirmed by Justice Clarke in the Chicago billboard case;[44] by Justice Brandeis in the Ice Cream case;[45] by Justice Clarke in the Queen's Gas

to the legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance of financial ability to compete. If the legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their state, and that there was no other case of frequent occurrence where the same could be said, we can not review their economics or their facts." Page 161.

[42] "The burden is on him who attacks the legislation and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that public welfare is not subserved by the legislation." Erie R. Co. v. Williams, 233 U. S. (1914) 685 at 699, 58 L. ed. 1155. Where, of course, the legislature has usage to support its position it is much stronger. People ex rel. v. Murray, 149 N. Y. (1896) 367 at 376, 44 N. E. 146; People v. Charles Schweinler Press, 214 N. Y. (1915) 395, 108 N. E. 639.

[43] An Illinois statute prohibited the sale of food preserved with preservatives containing boric acid. "The contention of the plaintiff in error could be granted only if it appeared that by a concensus of opinion the preservative was unquestionably harmless with respect to its contemplated uses; . . . It is plainly not enough that the subject should be regarded as debatable. If it be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature has decided." Price v. Illinois, 238 U. S. (1915) 446 at 452, 59 L. ed. 1400. Cf. Rast v. Van Deman & L. Co., 240 U. S. (1916) 342 at 357, 60 L. ed. 679. See also Radice v. New York, 264 U. S. (1924) 292, 68 L. ed. 690; People ex rel. v. La Fetra, 230 N. Y. (1921) 429, 130 N. E. 601; Parrott v. Benson, 114 Wash. (1921) 117, 194 Pac. 986.

[44] He declared that the courts were disposed "to favor the validity of laws relating to matters completely within the territory of the state enacting them and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the state." Thomas Cusack Co. v. Chicago, 242 U. S. (1916) 526, 61 L. ed. 472.

[45] State v. Hutchinson Ice Cream Co., 168 Iowa (1914) 1, 147 N. W. 195, affirmed Hutchinson Ice Cream Co. v. Iowa, 242 U. S. (1916) 153, 61 L. ed. 217.

Company case;[46] by Justice Day in the Municipal Fuel Yard case;[47] and Justice McKenna rested the case of Bunting v. Oregon, in no small degree on it.[48] In the Filled Milk case, Justice Holmes cited the decision of Justice Hughes three years before as the basis for his application of the rule,[49] and it formed the chief justification given by Justice Day in upholding the Non-Partisan legislation of North Dakota.[50]

These last two decisions, however, break new ground in one respect. In all the former cases, although the facts had been hotly contested, and the court took pains to point out that evidence had been presented which went far to uphold the law.[51] Therefore every presumption was to be engaged in to support the law, and "only clear and demon-

[46] In some respects this case is very exceptional for the court refused to review the facts or even the reasonableness of the administrative order. Part of this case seems hardly to be sound law. New York ex rel. v. McCall, 245 U. S. (1917) 345, 62 L. ed. 337.

[47] "While the ultimate authority to determine the validity of legislation under the Fourteenth Amendment is rested in this court, local conditions are of such varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information." Jones v. Portland, 245 U. S. (1917) 217 at 221, 62 L. ed. 252.

[48] 243 U. S. (1916) 426, 61 L. ed. 830.

[49] Hebe Co. v. Shaw, 248 U. S. (1918), 297, 63 L. ed. 255. "If the character or effect of the article as intended to be used 'be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury,' or, we may add, by the personal opinion of the judges, 'upon the issue which the legislature has decided.'" Page 303.

[50] "What was or was not a public use was a question concerning which local authority, legislative and judicial, had especial means of securing information to enable them to form a judgment; and particularly that the judgment of the highest court of the state, declaring a given use to be public in its nature, would be accepted by this court, unless clearly unfounded." Green v. Frazier, 253 U. S. (1920) 233 at 242, 64 L. ed. 878. In this case the North Dakota court boasted that it was deciding finally the fact of public use and that the United States Supreme Court would defer to its judgment. Green v. Frazier, 44 N. Dak. (1920) 395, 176 N. W. 11.

[51] "The legislature may well have found in these facts persuasive evidence that the public welfare required the prohibition enacted." Elaborate testimony had been presented in both the state court (State v. Hutchinson Ice Cream Co., 168 Iowa (1914) 1, 147 N. W. 195) and the federal Supreme Court to prove that "ice-cream" had no regular connotation and so the legislature could give it one by law. Justice Brandeis, Hutchinson Ice Cream Co. v. Iowa, 242 U. S. (1916) 153, 61 L. ed. 217.

strated usurpation of power will authorize judicial interference with legislative action."[52] In the recent cases, however, there was little attempt to justify the law by an array of scientific evidence. They seem to represent, consequently, merely another type of the application of judicial prejudice which had earlier developed out of the concept of judicial notice.[53]

There are indications, however, that the court is tending to revert to the older view at the present time.[54] Although they have indicated that the rule of caution is to be applied in overruling legislative determinations of facts, some of the judges have intimated that such a determination is not to be considered conclusive, unless the question may be fairly said to be a debatable one.[55]

Other cases in which the courts have deferred to the legislature are: Dominion Hotel Co. v. Arizona, 249 U. S. (1919) 265, 63 L. ed. 597. (Justice Holmes declared: "The Fourteenth Amendment is not a pedagogical requirement of the impracticable." Page 268); United States v. Standard Brewery, 251 U. S. (1920) 210, 64 L. ed. 209; State v. Cantwell, 179 Mo. (1904) 245, 78 S. W. 569, affirmed Cantwell v. Missouri, 199 U. S. (1905) 602, 50 L. ed. 329; New York ex rel. v. Hesterberg, 211 U. S. (1908) 31, 53 L. ed. 75; Parrott v. Benson, 114 Wash. (1921) 117, 194 Pac. 986; State v. Pitney, 79 Wash. (1914) 608 at 612, 140 Pac. 918; Fisher Flouring Mills Co. v. Brown, 109 Wash. (1914) 680, 187 Pac. 399; Security Savings Bank v. California, 263 U. S. (1923) 282, 68 L. ed. 301.

[52] Green v. Frazier, 253 U. S. (1920) 233, 64 L. ed. 878.

[53] A reversion to the older view that the court must review legislative determination of facts is to be found in Society of the Holy Name v. Pierce, 296 Fed. (1924) 928, affirmed 268 U. S. (1925) 510, 69 L. ed. 1070.

[54] Society of the Holy Name v. Pierce, 296 Fed. (1924) 928 at 935. "But there is a limit to the manner in which these powers may be exercised by the state. They can not be exercised arbitrarily and despotically, nor unless there exists a reasonable relation between the character of the legislation and the policy to be subserved. Nor is the state legislature the final judge of the limitations of the police power. Its enactments will be set aside when found to be unwarranted and arbitrary interference with rights protected by the constitution in carrying on a lawful business or occupation in the use and enjoyment of property." Per District Justice Wolverton. This decision was affirmed in Pierce v. Society of Sisters, 268 U. S. (1925) 510, 69 L. ed. 1070.

It is very significant that in its decision upholding the California alien land law, the court did not rely at all on the doctrine of legislative determination of local conditions. This seemed to be a case where the local determination might have been given great weight, but Justice Butler ignored it and placed the case squarely upon his own interpretation of the situation. Terrace v. Thompson, 263 U. S. (1923) 197, 68 L. ed. 255.

[55] "The legislature had before it a mass of information from which

§ 229. In submitting evidence to the court against an act which is considered unconstitutional, or in favor of one which it is hoped will be upheld, a number of alternatives are available. In the first place, the evidence may be in the nature of scientific proof upon the matters involved. Although it may be widely outside the range of ordinary judicial knowledge, the courts have always treated medical evidence as of prime importance.[56] Since the case of Muller v. Oregon,[57] statistical evidence has been generally considered acceptable;[58] in rate fixing cases the findings of engineers and other officers of governmental commissions have long been taken into account;[59] and reports

it concluded that night work is substantially and especially detrimental to the health of women. We can not say that the conclusion is without warrant. . . . Testimony was given upon the trial to the effect that the night work in question was not harmful; but we do not find it convincing. Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the law-maker." Justice Sutherland, Radice v. New York, 264 U. S. (1924) 292 at 294, 68 L. ed. 690.

[56] Ernst Freund, The Police Power (Chicago, 1904), sec. 145.

In sustaining the Supplemental Prohibition Act of 1921 which prohibited physicians prescribing intoxicating malt liquors for medicinal purposes, Justice Sanford declared: "Neither beer nor any other intoxicating malt liquor is listed as a medicinal remedy in the United States Pharmacopoeia. They are not generally recognized as medicinal agents. There is no consensus of opinion among physicians and medical authorities that they have any substantial value as medicinal agents; and while there is some difference of opinion on this subject the question is, at the most, debatable. And their medicinal properties, if any, may, it appears be supplied by the use of other available remedies." Everard's Breweries v. Day, 265 U. S. (1924) 545 at 562, 68 L. ed. 1174.

Other cases in which medical evidence has been considered by the courts are: Yesler v. Washington Harbor Line Commrs., 146 U. S. (1892) 646, 36 L. ed. 1119; Schollenberger v. Pennsylvania, 171 U. S. (1898) 1, 43 L. ed. 49; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. (1905) 306, 50 L. ed. 204; People v. Marx, 99 N. Y. (1885) 377, 2 N. E. 29; Bowes v. Aberdeen, 58 Wash. (1910) 535, 109 Pac. 369, 30 L. R. A. (N. S.) 709; State ex rel. v. Withnell, 91 Nebr. (1912) 101, 135 N. W. 376; People v. Weiner, 271 Ill. (1915) 74, 110 N. E. 870. On the other hand see State v. Cantwell, 179 Mo. (1904) 245, 78 S. W. 569, affirmed Cantwell v. Missouri, 199 U. S. (1905) 602, 50 L. ed. 329.

[57] 208 U. S. (1908) 412, 52 L. ed. 551.

[58] See State ex rel. v. Withnell, 91 Nebr. (1912) 101, 135 N. W. 376.

[59] The first of these cases to go elaborately into questions of fact was Smyth v. Ames, 171 U. S. (1898) 361, 43 L. ed. 197. See also: Chicago,

of similar bodies have often been considered in connection with social legislation.[60] Some courts, in addition to the willingness to accept recognized scientific evidence,[61] based their decisions directly on the testimony of economists,[62] sociologists,[63] penologists,[64] or even the results of hearings before congressional committees.[65]

M. &c. R. Co. v. Tompkins, 176 U. S. (1900) 167, 44 L. ed. 417; Northern Pac. R. Co. v. North Dakota ex rel., 236 U. S. (1915) 585, 59 L. ed. 735; Minnesota Rate Cases, 230 U. S. (1912) 352, 57 L. ed. 1511; Willcox v. Consolidated Gas Co., 212 U. S. (1909) 19, 53 L. ed. 382; Bluefield Water Works & Imp. Co. v. Public Service Commn., 262 U. S. (1923) 679, 67 L. ed. 1176; Georgia Railway & Power Co. v. Railroad Commn., 262 U. S. (1923) 625, 67 L. ed. 1144; Ohio Valley Water Co. v. Ben Avon, 253 U. S. (1919) 287, 64 L. ed. 908; Ohio Utils. Co. v. Public Utils. Commn., 267 U. S. (1925) 359, 69 L. ed. 656.

[60] McLean v. Arkansas, 211 U. S. (1909) 539, 53 L. ed. 315. Here Justice Day relied to a very considerable extent upon the report of the Industrial Commission. Justice Brandeis very frequently includes long quotations from government documents to support the decisions or his dissenting opinion. Note especially Omaechevarria v. Idaho, 246 U. S. (1917) 343, 62 L. ed. 763; Adams v. Tanner, 244 U. S. (1917) 590, 61 L. ed. 1336; Jay Burns Baking Co. v. Bryan, 264 U. S. (1924) 504, 68 L. ed. 813. See also the decision of Justice McKenna in Walls v. Midland Carbon Co., 254 U. S. (1920) 300, 65 L. ed. 276; Ward v. Krinsky, 259 U. S. (1922) 503, 66 L. ed. 1033. On the contrary see Adkins v. Children's Hospital, 261 U. S. (1923) 525, 67 L. ed. 785.

Typical state cases in which the findings of administrative bodies have been used by the courts are: State v. Barrett, 172 Ind. (1902) 169, 87 N. E. 7; People v. Charles Schweinler Press, 214 N. Y. (1915) 395, 108 N. E. 639; State v. Crowe, 130 Ark. (1917) 272, 197 S. W. 4.

In United States v. L. Cohen Groc. Co., 255 U. S. (1921) 81, 65 L. ed. 516, the difficulties which administrative bodies had had in interpreting the law were cited to prove its indefiniteness.

[61] Note the curious statement in the case of State v. Somerville, 67 Wash. (1912) 638 at 641, 122 Pac. 324. "Courts . . . must look at the terms of the act itself, and bring to their assistance such scientific, economic, physical, and other pertinent facts as are common knowledge and of which they can take judicial notice." It is not clear just how far the court intended to use information of a scientific nature which had not yet become "common knowledge."

[62] State ex rel. v. Clausen, 65 Wash. (1911) 156, 117 Pac. 1101.

[63] State v. Feilen, 70 Wash. (1912) 65, 126 Pac. 75.

[64] People v. Finley, 153 Cal. (1908) 59 at 62, 94 Pac. 248, affirmed and quoted in Finley v. California, 222 U. S. (1911) 28, 56 L. ed. 75.

[65] "When the bill was pending in congress the judiciary committee of the House of Representatives held an extended public hearing, in which it received testimony, among other things, on the question whether beer and other intoxicating malt liquors possessed any substantial medicinal properties. Hearings before House Judiciary Committee on H. R. 5033, Serial 2, May 12, 13, 16, 17, 20, 1921. On the information thus received the committee recommended the passage of the bill. H. R., 67th Cong., 1st Sess., Rep. No. 224. And in the light of all the testimony congress

§ 230. A second class of evidence may be inferred from legislative actions. Thus when the legislative body makes a determination and subsequently, without any apparent reason, makes another which is directly contrary to the first, the courts consider that there is a prima facie case against the second act.[66] This is the same rule in legislative matters that is well recognized in rulings of administrative boards,[67] and although very few cases involve this rule, it has never been seriously questioned. Closely connected with the rule is its corollary that if the legislature does not make the law a general one, that fact of itself may point to the conclusion that it has no reasonable relation to the police power.[68]

§ 231. In the third place, the federal courts may look to the decisions of the state tribunals to decide upon the material facts. If the state courts have determined that the procedure in a given case was a valid one under the due process protection, the United States Supreme Court will consider that as establishing a presumptive case for its validity.[69] Likewise, statements of the courts supporting a classification and those in favor of the validity of the legislative object, especially when these statements are added to the declaration of the legislature, are given great weight in the federal courts.[70] The same rule has been

determined, in effect, that intoxicating malt liquors possessed no substantial and essential medicinal properties which made it necessary that their use for medicinal purposes should be permitted, and that, as a matter affecting the public health, it was sufficient to permit physicians to prescribe spirituous and vinous intoxicating liquors in addition to the non-intoxicating malt liquors whose manufacture and sale is permitted under the National Prohibition Act." Everard's Breweries v. Day, 265 U. S. (1924) 545 at 561, 68 L. ed. 1174, per Justice Sanford.

66 Dobbins v. Los Angeles, 195 U. S. (1904) 223, 238, 49 L. ed. 169.

67 State ex rel. v. Illinois State Board of Dental Examiners, 110 Ill. (1884) 180; Illinois State Board of Dental Examiners v. People ex rel., 123 Ill. (1887) 227, 13 N. E. 201.

68 This was the case in the Wisconsin upper berth law. Chicago, M. & St. P. R. Co. v. Wisconsin, 238 U. S. (1915) 491, 59 L. ed. 1423.

69 Frank v. Mangum, 237 U. S. (1914) 309, 59 L. ed. 969.

70 "The Supreme Court of California has held in a number of cases that the irrigation act is in accordance with the state constitution . . . and the corporations organized by virtue of the act for the purpose of

applied to decisions of state courts upholding the use of the repeal power over corporation charters.[71] This is of course due to the fact that the state courts are in closer touch with the local situation and hence are better able to judge matters of fact.[72]

§ 232. Closely allied with this doctrine is the long established rule, based on the Judiciary Act of 1789,[73] that the federal courts will not review decisions of the state

irrigation are public municipal corporations, organized for the promotion of the prosperity and welfare of the people. . . .

"We do not assume that these various statements, constitutional and legislative, together with the decisions of the state court, are conclusive and binding upon this court upon the question as to what is due process of law, and as incident thereto, what is public use. As here presented these are questions which also arise under the federal constitution, and we must decide them in accordance with our views of constitutional law.

"It is obvious, however, that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject matter in regard to which the character of the use is questioned." Justice Peckham, Fallbrook Irrigation District v. Bradley, 164 U. S. (1896) 112 at 159, 160, 41 L. ed. 369.

This doctrine has been affirmed time and again. Capital City Dairy Co. v. Ohio, 183 U. S. (1902) 238, 46 L. ed. 171; Clark v. Nash, 198 U. S. (1905) 361 at 369, 49 L. ed. 1085; Strickley v. Highland Bay Min. Co., 200 U. S. (1906) 527 at 531, 50 L. ed. 581; Offield v. New York, N. H. & H. R. Co., 203 U. S. (1906) 372 at 377, 51 L. ed. 231; Hairston v. Danville & W. R. Co., 208 U. S. (1908) 598 at 607, 52 L. ed. 637, 641; Union Lime Co. v. Chicago & N. W. R. Co., 233 U. S. (1914) 211, 58 L. ed. 924; O'Neill v. Leamer, 239 U. S. (1915) 244, 60 L. ed. 249; Jones v. Portland, 245 U. S. (1917) 217, 62 L. ed. 252; Welch v. Swasey, 214 U. S. (1909) 91 at 106, 53 L. ed. 923; French v. Barber Asphalt Paving Co., 181 U. S. (1901) 324 at 341, 45 L. ed. 879; Laurel Hill Cemetery v. San Francisco, 216 U. S. (1909) 358, 359, 54 L. ed. 515.

[71] "The determination whether the power to repeal, alter, or amend was exerted in such a manner as to be unjust to incorporators was within the province of the state court to finally decide, unless that power was exerted in such an arbitrary manner as, irrespective of the contract clause, to deprive of some other and fundamental right which was within the protection of the constitution of the United States." Justice White, Hammond Packing Co. v. Arkansas, 212 U. S. (1908) 322 at 346, 53 L. ed. 530.

[72] See also Jackman v. Rosenbaum Co., 260 U. S. (1922) 22, 67 L. ed. 107. The rule that a divided court affirms the decision of the lower tribunal rests on similar foundation. This was the case in Stettler v. O'Hara, 243 U. S. (1917) 629, 61 L. ed. 937.

When the state Supreme Court has given a construction to a law which makes it definite, the Supreme Court of the United States will, of course, adopt that construction and consequently the law will not be declared contrary to due process because of its indefiniteness. Southeastern Express Co. v. Miller, 264 U. S. (1924) 535, 68 L. ed. 836.

[73] United States Statutes at Large, Vol. I, p. 73, ch. 20.

courts in which the state law is declared to conflict with the federal Constitution.[74] A number of difficulties resulted from this rule. Some of the state courts were inclined to be more rigid in their interpretation of due process than others, and consequently, although the Supreme Court of the United States might declare a law valid, it might be unconstitutional in an individual state because the state courts might prevent its removal to the federal tribunals by declaring it void.[75] Indeed, one court went so far as to declare that it did not consider itself bound by the decisions of the federal tribunal in upholding state laws.[76]

With the increasing importance of due process of law in the federal Constitution, this provision of the Judiciary Act caused much greater difficulty and occasioned no small

[74] Gordon v. Caldcleugh, 3 Cranch (U. S., 1806) 268, 2 L. ed. 576; McDonough v. Millaudon, 3 How. (U. S., 1844) 693, 11 L. ed. 787; Fulton v. M'Affee, 16 Pet. (U. S., 1842) 149, 10 L. ed. 918; Linton v. Stanton, 12 How. (U. S., 1851) 423, 13 L. ed. 1050; Burke v. Gaines, 19 How. (U. S., 1856) 388, 15 L. ed. 655; Reddall v. Bryan, 24 How. (U. S., 1860) 420, 16 L. ed. 740; Roosevelt v. Meyer, 1 Wall. (U. S., 1863) 512, 17 L. ed. 500; Ryan v. Thomas, 4 Wall. (U. S., 1866) 603, 18 L. ed. 460. See also Frank J. Goodnow, Social Reform and the Constitution (N. Y., 1911), pp. 329, 330; W. F. Dodd, "The United States Supreme Court as the Final Interpreter of the Federal Constitution," Illinois Law Review, Vol. VI (Dec., 1911), p. 289.

[75] The New York Court of Appeals was said to have been an especial offender in this regard. In regard to hours of labor for women compare People v. Williams, 189 N. Y. (1907) 131, 81 N. E. 778, with Muller v. Oregon, 208 U. S. (1908) 412, 52 L. ed. 551. In regard to workmen's compensation legislation compare Ives v. South Buffalo R. Co., 201 N. Y. (1911) 271, 94 N. E. 431, with Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. (1911) 549, 55 L. ed. 328, and Second Employer's Liability Cases, 223 U. S. (1912) 1, 56 L. ed. 327. See also 12 *Corpus Juris*, p. 1283, Constitutional Law, sec. 1092. A number of other instances of this inconsistency have been collected by Dodd, "The United State Supreme Court as the Final Interpreter of the Federal Constitution," Illinois Law Review, Vol. VII (Dec., 1911), p. 289.

[76] "We are of course not bound to follow the views of the Supreme Court of the United States in passing upon the validity of our statutes further than that we recognize our obligation not to enforce a statute which is in violation of the constitution of the United States. We are not bound, therefore, by any obligation imposed upon us in the federal constitution to uphold a state statute merely because, in the view of the Supreme Court of the United States, it is not unconstitutional." Justice McClain, McCollum v. McConaughy, 141 Iowa (1909) 172 at 176, 119 N. W. 539.

amount of criticism.[77] In 1914 the Judiciary Code was amended to enable the Supreme Court of the United States to review decisions of the state courts, on writ of certiorari, when those bodies had held that the state statutes conflicted with the federal constitution.[78] It is noteworthy, however, that even with this authorization, the Federal Supreme Court has made very slight use of its increased power. A few writs of certiorari have been granted, many have been denied, and the only case in which the writ has been granted, where the case involved due process of law, would have been appealable under the old law.[79] The large number of writs which have been denied can be explained only on the ground that the court tends, if possible, to take the decisions of the state tribunals as final.[80]

§ 233. The last type of evidence, which the courts will consider in looking into questions of fact involved in due

[77] The American Bar Association took the matter up and was largely responsible for the reform which was effected in 1914. "Enlarged Jurisdiction for the Federal Supreme Court," Harvard Law Review (Vol. 28, Feb., 1915), pp. 408, 409. See the criticism of W. L. Ransom, Majority Rule and the Judiciary (N. Y., 1912), pp. 49-52.

[78] Act of December 23, 1914, amending the Judiciary Code (1911), ch. 10, sec. 237. United States Compiled Statutes (Annotated 1916) (St. Paul, 1916), Vol. II, p. 1580, sec. 1214; Federal Statutes Annotated (Northport, N. Y., 1917), Vol. V, p. 792.

[79] Down to the end of volume 243 U. S. there were no decisions determined on writs of certiorari to state courts. In 1917 a few writs were granted, as has been the case in each year following, but down to June 1, 1921, the only case involving due process of law in the Fourteenth Amendment was that of Brooks-Scanlon Co. v. Railroad Commission, 251 U. S. (1920) 396, 64 L. ed. 323. In this case the Louisiana court upheld the order of the Railroad Commission compelling a sawmill to continue operating a railroad on which it had occasionally carried freight and passengers for the public. The company claimed this order violated due process of law. There seems no reason why the ruling of the state court could not have been appealed. For a list of cases in which the writ of certiorari was granted and denied, see Federal Statutes, Annotated, Vol. V, p. 794, Federal Statutes Annotated, Supplement, 1918, p. 411, 1920, pp. 633, 658, 659, 1921, p. 606. That the court is very reluctant to use this new power may be seen by Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. (1921) 282, 66 L. ed. 239.

[80] The overworked condition of the federal Supreme Court, being continually pressed with cases, is probably another reason why the Federal Supreme Court had not seen fit to take greater advantage of this authorization.

process cases, is public opinion. The courts have often felt the danger of the law growing away from the customs, habits, and opinions of the people, and some of the English common law justices were said to have deliberately endeavored to mold the law in accordance with the wishes of the people.[81] In America, however, the opinion is generally prevalent that our courts are placed far and above popular whim and prejudice—an independent, impartial body able to judge according to the established rules of law without bias or partisanship.[82] In the last thirty years, however, a movement has grown up to give greater recognition to the unmistakable voice of public opinion in judicial decisions. This movement, reflected in the demand for the recall of judges and judicial decisions, has been recognized in a number of opinions. The influence of popular will was admitted by the court in two cases as early as 1896. In upholding the Jim Crow car law, the court considered the customs and usages of the people in determining the validity of the police power regulation;[83] and in the Fallbrook Irrigation case, the court was influ-

[81] "Important as it was that the people should get justice, it was even more important that they should be made to see and feel that they were getting it." Lord Herschell, Atlay Victorian Chancellors, Vol. II, p. 460. Quoted in Roscoe Pound, "Mechanical Jurisprudence," Columbia Law Review, Vol. VIII (Dec., 1908), pp. 605-623 at 606.

[82] "A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors . . . and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty." T. M. Cooley, Constitutional Limitations, pp. 68, 69. Compare the statement of Justice Matthews, Hurtado v. People, 110 U. S. (1884) 516 at 530-535, 28 L. ed 232.

[83] Plessy v. Ferguson, 163 U. S. (1896) 537, 41 L. ed. 256.

enced to a considerable extent by the fact that the people saw a great public necessity in fostering irrigation projects.[84]

It was not, however, until 1903 that the court deliberately stated that it would give public opinion any considerable weight in determining the legitimacy of the legislative object. This development was fostered by Justice Holmes, whose decision in the case of the California option law is perhaps most noted for this very point.[85] In the vaccination cases the courts took a slightly different attitude, but one which, in the end, amounted to a declaration that public opinion should be the guide in judging the methods of exercising the police power. These cases rest not so much upon the ground that the public opinion of one state is in favor of vaccination, as upon the overwhelming opinion of mankind in favor of it.[86]

84 Fallbrook Irrigation District v. Bradley, 164 U. S. (1896) 112, 41 L. ed. 369. See also People ex rel. v. Murray, 149 N. Y. (1896) 367 at 376, 44 N. E. 146.

85 "Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the state thinks that an admitted evil can not be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts can not interfere unless, in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law.'" The provision in question had been incorporated in the state constitution and so had been ratified by the people at the polls. Otis & Gassman v. Parker, 187 U. S. (1903) 606 at 609, 47 L. ed. 323.

86 "It is a fact of common knowledge that smallpox is a terrible disease whose ravages have sometimes swept away thousands of human beings in a few weeks. It is equally well known that a large majority of the medical profession and of people generally consider vaccination, repeated at intervals of a few years, a preventive of the disease. So far as we are aware, all courts that have considered the subject have recognized the right of the legislature to enact laws founded upon the theory that vaccination is important as a preventive of smallpox. . . ." Commonwealth v. Jacobson, 183 Mass. (1902) 242 at 245, 66 N. E. 719.

"What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief, and is maintained by high medical authority." Justice Harlan, citing with approval the decision of the Massachusetts court. Jacobson v. Massachusetts, 197 U. S. (1905) 11 at 30, 49 L. ed. 643.

"We do not decide and can not decide that vaccination is a preventive

§ 234. The subsequent development of judicial deference to public sentiment, therefore centered around three ideas. First, is the law in accordance with common custom and usage? Second, does public sentiment favor the law? Third, is the law in accord with a firm and established concensus of opinion in the civilized world? In 1910 Justice Holmes declared in the Laurel Hill Cemetery case, that "Tradition and habits of the community count for more than logic,"[87] and the next year this doctrine was given its classic statement by Chief Justice Winslow in Borgnis v. Falk Company.[88] This concept, however, seems to have been losing ground, for it did not appear again until the Truax case, and then only to be rejected in the majority opinion.[89]

The second conception, that the public sentiment in the territory affected by the law should be consulted in pass-

of smallpox, we take judicial notice of the fact that this is the common belief of the people of the state, and with this fact as a foundation, we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power." Justice Vann, Matter of Viemeister, 179 N. Y. (Ct. of Appeals, 1904) 235 at 241.

[87] Laurel Hill Cemetery v. San Francisco, 216 U. S. (1909) 358 at 364, 365, 54 L. ed. 515.

[88] His argument is too long for quotation but in brief it is as follows: Governments founded on written constitutions are difficult of amendment and lose much in flexibility. This is overcome by the gain of stability and freedom from whimsicality but the loss still remains. However, the conditions of life and the political philosophy of the people are constantly changing. Therefore when there is no express prohibition in the constitution but only general language or a general policy this policy should not be construed by the courts to prevent the progress of the race. The conditions prevailing at the time of the adoption of the constitution must be considered in such cases of general policy, but the changed social, economic and political conditions and ideals of the time as well as the problems which the changes have produced, must also logically enter into consideration. 147 Wis. (1911) 327 at 348, 350, 133 N. W. 209. See also People v. Charles Schweinler Press, 214 N. Y. (1915) 395, 108 N. E. 639.

[89] "Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial, and political, of the community to be affected thereby . . . Nearly all legislation involves weighing of public needs as against private desires; and likewise a weighing of relative social values." Dissenting opinion of Justice Brandeis, Truax v. Corrigan, 257 U. S. (1921) 312 at 356, 357, 66 L. ed. 254. There is no mention of this in the majority opinion.

ing upon its constitutionality, was likewise kept before the court by Justice Holmes,[90] and seems to have been adopted by Justice McKenna.[91] This doctrine, however, has been very severely criticized,[92] and, were it not for the fact that it has received additional support in the North Dakota Non-Partisan laws case, one would be tempted to take the wish for the thought and consign it to an early grave.[93]

§ 235. The third conception of public opinion, however, may be regarded as having more value in the interpretation of constitutional guarantees. If by public opinion is meant a settled crystalized form of public sentiment, which has become at once conviction and practically universally recognized, one may perhaps see more reason why the courts should take it into account as important evidence in matters of fact.[94]

[90] "The plaintiff must wait until there is a change of practice or at least an established concensus of civilized opinion, before it can expect this court to overthrow the rules that the lawmakers and the court of his own state uphold." Laurel Hill Cemetery v. San Francisco, 216 U. S. (1909) 358 at 366, 54 L. ed. 515.

[91] Adams v. Milwaukee, 228 U. S. (1912) 572, 57 L. ed. 971.

[92] "In a government like ours theories of public good or necessity are often so plausible or sound as to command popular approval, but the courts are not permitted to forget that the law is the only chart by which the ship of state is to be guided." Justice Werner, Ives v. South Buffalo R. Co., 201 N. Y. (1911) 271 at 294, 295, 94 N. E. 431.

"Skilfully directed agitation might also bring about apparent condemnation of any one of them [professions] by the public. Happily for all, the fundamental guarantees of the constitution can not be freely submerged if and whenever some ostensible justification is advanced and the police power invoked." Justice McReynolds, Adams v. Tanner, 244 U. S. (1917) 590, at 594, 595, 61 L. ed. 1336.

[93] "Only clear and demonstrated usurpation of power will authorize judicial interference with legislative action. . . . With this united action of people, legislature and court, we are not at liberty to interfere unless it is clear beyond reasonable controversy that rights secured by the federal constitution have been violated." Justice Day, Green v. Frazier, 253 U. S. (1920) 233 at 239, 240, 64 L. ed. 878. There seems a tendency away from this view. Justice Brandeis urged it unsuccessfully in Truax v. Corrigan, 257 U. S. (1921) 312 at 357, 66 L. ed. 254.

[94] This type of public opinion is discussed in A. Lawrence Lowell, Public Opinion and Popular Government (N. Y., 1913), chs. I-IV, and A. B. Hall, Popular Government (N. Y., 1921), chs. I-II. Its relation to constitutional restraints is excellently discussed in chapter VII of the latter work. The theory bears a close relation to Rousseau's doctrine of the common will.

Justice Holmes, among the judges on the United States Supreme Court, seems again to have been the chief apostle of this doctrine, carrying it along with his other ideas of the importance of popular sentiment in the interpretation of the constitution.[95] In his various discussions, he seems hardly to have differentiated between the different types of popular opinion.[96] The third type, however, has received wide recognition from the courts.[97] As early as 1908 Justice Brewer utilized it in his opinion in Mueller v. Oregon.[98] In 1915 Justice Hughes intimated that he took real public opinion into consideration in determining the validity of police power regulations.[99] That the view there expressed has considerable vitality may be seen from the fact of its reappearance in the Indiana coal case,[1] the District of Columbia Rent cases,[2] the Service Letter case,[3] and the

95 It was foreshadowed, however, in People ex rel. v. Murray, 149 N. Y. (1896) 367 at 376, 44 N. E. 146.

96 "It may be said in a general way that the police power extends to all the great public needs. Camfield v. United States, 167 U. S. 518, 42 L. ed. 260. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce." Noble State Bank v. Haskell, 219 U. S. (1911) 104 at 111, 55 L. ed. 112. See also Central Lumber Co. v. South Dakota, 226 U. S. (1912) 157, 57 L. ed. 164.

97 "A conception so general can not be without cause. The universal sense of a people can not be accidental; its persistence saves it from the charge of unconsidered impulse." German Alliance Ins. Co. v. Lewis, 233 U. S. (1914) 389 at 412, 58 L. ed. 1011.

98 "Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge." Muller v. Oregon, 208 U. S. (1908) 412 at 420, 421, 52 L. ed. 551.

99 Price v. Illinois, 238 U. S. (1915) 446, 59 L. ed. 1400.

1 Lower Vein Coal Co. v. Industrial Board, 255 U. S. (1921) 144, 65 L. ed. 555.

2 Block v. Hirsh, 256 U. S. (1921) 135, 65 L. ed. 865.

3 Prudential Ins. Co. v. Cheek, 259 U. S. (1922) 530, 66 L. ed. 1044, per Justice Pitney.

Everard's Breweries case.[4] Furthermore, it seems to have been adopted in at least two state decisions.[5]

In this increasing recognition of true public opinion as evidence of the existence of certain facts in due process cases, it appears that the courts are but following a trend which is the logical outcome of the well-established presumption of constitutionality. Unless the case against the law is so obvious that judicial notice may be taken of it; unless evidence of certain very restricted kinds is offered to prove that the law is unconstitutional; unless the legislature acted in obvious bad faith in the classification or public purpose of the law, the court will uphold it. When, however, the act is of such a nature that no state of facts can be conceived which will support it, the duty of the courts is plain.[6] Thus, while in a measure the attitude of

[4] "That the opinion is extensively held that the prohibition of prescription of malt liquors is a necessary and proper means to the suppression of the traffic in intoxicating beverages likewise appears from the legislation in many states, under which such prescriptions are not permitted." Justice Sanford in Everard's Breweries v. Day, 265 U. S. (1924) 545 at 562, 68 L. ed. 1174.

"That the opinion is extensively held that a general prohibition of the sale of malt liquors, whether intoxicating or not, is a necessary means to the suppression of trade in intoxicants, sufficiently appears from the legislation of other states and the decision of the courts in its construction. State v. O'Connell, 99 Maine (1904) 61, 58 Atl. 59; State v. Jenkins, 64 N. H. (1887) 375, 10 Atl. 699; State v. York, 74 N. H. (1907) 125, 127, 65 Atl. 685; State ex rel. v. Kauffman, 68 Ohio St. (1903) 635, 67 N. E. 1062; Luther v. State, 83 Nebr. (1909) 455, 120 N. W. 125, 20 L. R. A. (N. S.) 1146; Pennell v. State, 141 Wis. (1909) 35, 123 N. W. 115. We can not say that there is no basis for this wide-spread conviction." Justice Hughes in Purity Extract & Tonic Co. v. Lynch, 226 U. S. (1912) 192 at 204, 205, 57 L. ed. 184. For other cases involving the validity of laws prohibiting the sale of malt liquor see pp. 324, 325.

Notice also the statement of Justice Brandeis in the dissent to Truax v. Corrigan, 257 U. S. (1921) 312 at 356, 357, 66 L. ed. 254: "Nearly all legislation involves a weighing of public needs as against private desires; and likewise a weighing of relative social values. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and widespread and has been reached after deliberation."

[5] State v. Crowe, 130 Ark. (1917) 272, 197 S. W. 4; In re Hall, 50 Cal. App. (1921) 786, 195 Pac. 975.

[6] "So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open

the courts in allowing the legislature to determine *prima facie* questions of fact, is salutary; this doctrine, if carried to its extreme, would mean the practical abdication of the judicial function. It remains for the future to reveal whether the courts will draw the line loose or close, whether the question of fact will entirely swallow the questions of legal precedent involved.

to interested parties to contend that the legislature has gone beyond its constitutional powers." Justice Holmes, Pennsylvania Coal Co. v. Mahon, 260 U. S. (1922) 393 at 413, 67 L. ed. 322.

PART XI.

CONCLUSION.

CHAPTER XXVI.

THE FUNCTION OF DUE PROCESS OF LAW.

§ 236. The roots of due process of law lie much deeper than the struggle between King John and his refractory barons at Runnymede. Both in its origin and its development the concept must be considered as the normal accompaniment of the evolution of constitutional government. It was more than a century after the granting of the Great Charter before the phrase "due process of law" was first officially used, but the term "law of the land" expressed for the nobles of the thirteenth century the idea which due process conveyed in the fourteenth. Even if it be conceded that the terms were not identical in meaning, they were so closely related that no protest was made when Coke identified them. In a broader sense, therefore, it is not erroneous to look to 1215 as the year in which the foundation of due process was laid. The birthmark which the concept received at that time, it has never lost, and if due process of law has any meaning, it is that there is no sovereign unless he conform to the principles of legality.

It is evident that this protection has always been considered the most general of all our constitutional guarantees. The thirty-ninth article of Magna Carta was under-

stood as a wide undefined provision, and the subsequent struggles which have centered around it have only served to emphasize this. In 1215 it was invoked against judgment without trial; in 1628 against arrests without indictment; in 1776 against taxation without jurisdiction; and in 1868 against class legislation. In each instance it might be said that there was an addition to its meaning, but it is probably more nearly correct to consider this development as the appropriation of portions of the general residual meaning which it has always had. In both its origin and development the concept rests on the specification, in a number of acute constitutional struggles, of the balance between individualism and legal control.

There seems to be a deep-seated conviction in the Anglo-Saxon mind that a certain independence of action is valuable for social and political progress, and this can only be sacrificed when social considerations make it imperative to do so. Since it arose out of this conviction, due process has always been a social guarantee. It has always stood for the proposition that freedom of action as well as private property has a social value as well as an individual. It is, consequently, very closely related to the doctrines of natural law and inalienable rights. In this relation is to be found the foundation of the concept of due process as a legislative as well as an executive limitation. In the Middle Ages, it was a limitation upon governmental power in general, but as the functions of the agencies of the state became differentiated, there was a tendency to consider it as restricting only the power of the executive. The doctrine of natural rights stepped in to prevent the dwarfing of the concept.

This doctrine fell on stony ground in England. Its influence must be traced largely by inference. In fact, the negative results of the study of the development of due process in the constitutional development of England are much more significant than the positive. The legislature was too firmly intrenched; the judiciary too subject to political pressure; the natural checks of a homogeneous so-

ciety and the division of governmental functions too strong a protection; and the dignity of Parliament far too great to sanction any positive restriction on its power. Except in times of great constitutional stress, due process was taken for granted.

In America a more fertile soil was found. The bitter experience of the colonists with the English Parliament and their colonial and state legislatures destroyed much of their faith in legislative omnipotence. This, together with the tradition of judicial review of legislative action and the heterogeneous character of the population, made the development of the original scope of this protection a natural result. The American concept of due process of law, therefore, was due immediately to the peculiar conditions of life in the new republic.

§ 237. A number of important movements can be observed in the seven centuries of development centering around due process. It is evident to the most superficial investigator that it has greatly broadened in scope. In 1215 it applied only to the peak of the population pyramid —the freemen. The advance of civilization, political expediency, and the democratic theory were the external forces which fostered its extension. Internally, the functions of government have tremendously increased since the Middle Ages and if private rights were to be protected under the new conditions, it was necessary to either develop new protections or else to apply the old ones to the new situations. The nature of due process was such as to make it especially applicable to varying conditions. From the first it was thought to be a generic concept and throughout its entire development there has always remained a residual unappropriated element in the protection. This has given the appearance of a wrenching of the original protection, but a careful study of this development shows that this is an illusion. The germ of the modern development was wrapped up in the obscure phraseology of the Great Charter. Furthermore, in spite of the frequent and bitter

discussions which have centered around this protection, there has never been secured a general agreement regarding its exact meaning. The fact that it has always evaded definition is perhaps the strongest evidence that the protection secured is general rather than specific.

A second important tendency in the development of due process is the increasing frequency of its application. There has never been a period in Anglo-American constitutional history when the concept was not applied, but at no time was it so often invoked as at the present. This is still more significant if it be remembered that the courts have shown the greatest reluctance in utilizing it. Even in questions of procedure the courts preferred to uphold the law, or if necessary declare it void on other grounds, rather than to use due process. This is still more evident in cases involving questions of equality, and public purpose. It was only under the pressure of dire necessity that the United States Supreme Court was induced to develop the scope and application of the "law of the land" as a norm for testing legislation under the police power, the power of eminent domain, and the power of taxation.

There have always been tendencies working to restrict the meaning of due process of law. These influences appeared in England but they became most significant in American constitutional development. Many of the state constitutional conventions have had to meet proposals of this kind due to a general misconception of the nature of this protection. Even the courts themselves have not escaped the efforts of those who would confine the limits of due process more rigidly. In some cases a sharper definition tends to make the law more exact and is undoubtedly salutary. Thus when a sharp line is drawn between questions of law and questions of fact, it is possible for the courts to separate more accurately the problems involved in the case, and at the same time allow ample opportunity for the recognition of modern economic and social conditions.

The rule that the courts will uphold minor infractions of due process where these are necessary for administrative convenience is also restrictive in nature. If the classification is only slightly inaccurate, if the procedure is substantially in accordance with the principles of the common law, if the article has little legitimate value, and if the assessment is only slightly disproportionate to the benefit, the courts tend to uphold the legislation. In so far as these concessions are necessary to facilitate the administration of justice or the enforcement of the law, they would seem to be highly desirable. When, however, the court refuses to review the facts merely because the legislative branch has stated they should be interpreted in a given manner, it is obvious that we have practically an abdication of judicial functions. However desirable may be presumptions in favor of the validity of legislative determinations, if these are carried to the point of refusing to consider other evidence than that presented by the legislative declaration itself, the whole structure of judicial review is gone. The result is correlative to the situation which arises when the court takes judicial notice of the fact that the law can not be sustained and refuses to consider the evidence in the case. In either situation the scope of due process of law is limited without a corresponding gain in definiteness, or administrative or judicial efficiency.

§ 238. Although due process has always been considered a residual concept, a catch-all protection, limiting the entire government in favor of private rights, the scope of the concept at the present is reasonably definite. It has always been considered a very potent limitation upon judicial procedure. Whether the suit be in law or equity, it must be prosecuted in accordance with the law of the land, i. e., the principles of the common law. This implies under normal circumstances a notice and hearing, not merely of a formal nature, but one which under ordinary conditions will provide an opportunity for justice. Thus it has developed that it is not merely the formalities of the

common law which due process demands, for in certain types of cases they may be dispensed with, but the principles of justice and reasonableness which those forms were designed to protect.

Due process of law also limits the other main powers of government. In some respects, it would seem that the concept of the "law of the land" had no relation to the police power, the taxing power, or the power of eminent domain. There are *dicta* to the effect that the power of police regulation is bounded only by public necessity. The power of taxation has often been declared to be absolute. The power of eminent domain is limited only by the requirements of public use and reasonable compensation. In spite of the apparent unlimited nature of these powers in many respects, the courts have in each case pierced beneath the surface and have held that each was limited by the principles of due process. If the legislature can dispossess an individual of his property under the guise of making a police regulation, this restriction would seem to have no limit on the power of the law makers. This the courts refused to recognize in spite of the fact that they hesitated to apply the restriction of due process except in the most extreme kinds of cases.

Still more absolute is the power to alter or revoke corporate charters. When the right to do this has been specifically reserved in the charter, it would seem that no limits could be imposed on this power. It soon developed that, under the guise of altering the corporation powers, the legislature might actually divest stockholders of their property rights. Consequently, when an exercise of this power goes to that extent, the courts have consistently held that due process has been violated. This rule, however, only applies to the property of the corporation and not to its life or liberty. These may be taken away at will if the property of the shareholders is conserved. It is thus evident that due process has only partial application in cases arising under the repeal power. No better exam-

ple could be given of the fact that the limitations of this protection are those of principle rather than those of form.

§ 239. There are certain powers of government to which due process has never been applied. The right of the government to control the public domain and other public property, unless it is acquired as the result of taxation, has never been limited by this protection. The Fifth Amendment has frequently been said to have no relation to the amount of import duties levied or the articles which were taxed. In the prohibition of immigration, the coinage of money, the destruction of counterfeiting tools and other property which is illegal *per se,* no question has arisen involving due process. Although the military power is but a specialized form of the police power, the courts have refused to apply due process as a substantive limit in cases under it. In view of the obvious tendency of the courts to broaden the scope of the Fifth and Fourteenth Amendments, it may be asked if due process could not be applied in these extreme cases. Were Congress to attempt to make an obviously arbitrary discrimination in the legislation on any of these subjects, it is not inconceivable that the courts would again pierce the formal considerations which have prevented interference in these cases, and under their desire to protect private rights, hold the process applicable.

The political power of the state has never been thought subject to either the Fifth or the Fourteenth Amendment. Political privileges, such as the right to vote or the right to hold office, may apparently be curtailed or extended at will without any limitation of due process of law. This is doubtless because the power was practically unknown in the common law system, and has never been limited by any except moral principles. But here again it is conceivable that due process might apply in an extreme case. Could a state legislature, under the authority of the state constitution, provide that Republicans should forever be disfranchised? Could they vest the determination of

whether an individual was a Republican or not in the county clerk without any provision for notice and hearing? This question can only be raised, but if put to it, the history of judicial development of due process indicates that the courts might be induced to apply it even in these cases.

The close relation between the scope of due process of law and the principles of the common law is evident. There is hardly a sphere of governmental action, which was recognized at common law, which is not restricted by this protection. Furthermore, the principles upon which the courts will interfere in these cases are themselves derived from the English system. It is doubtful, however, in view of the desire of the courts to retain flexibility wherever possible, if it would be accurate to say that those powers which have developed since the golden age of English legal history are entirely without restriction on this score.

§ 240. Because the courts have tremendously extended the scope of due process, and because of the increasing frequency of its application, we must not be inferred that the courts have applied it with great alacrity. As matter of fact, the reluctance of the courts in utilizing the Fifth or Fourteenth Amendments forms one of the most characteristic features of its development. But the fact that due process has only been extended under the pressure of grim necessity does not mean that its development has been a haphazard concept. It may be a breach-loader, given to the courts to enable them to shoot any piratical craft on the legislative sea, but its range of action is severely limited. Certain principles have guided the courts in their application of this protection, although it is evident that at times these principles have been entirely subconscious.

The first of these principles is that of jurisdiction. Unless the power enacting the law, the officer executing it, and the courts in interpreting it have jurisdiction in the case there can be no due process. In fact so obvious is this principle that few cases have arisen under it. They have been confined almost entirely to the spheres of taxa-

tion and police power, where, due to our federal system of government questions of jurisdiction have become very important. In those cases where jurisdiction has been a problem in police power cases, the question has almost always been considered under the commerce clause.

A second principle which has directed the courts through the maze of due process cases centers around the concept of public purpose. Unless there is a valid public purpose in police power regulations the courts refuse to recognize them as such; unless the powers of taxation and eminent domain are exerted for public purposes, the courts consistently hold the legislation void. The very object of government is to conserve certain collective objects of the public welfare and unless the powers given the organs of government are used for these ends, there can be no question of the invalidity of the usurpation.

Closely connected with the concept of public purpose is the rule that the law must actually make good in securing the object for which it has ostensibly been enacted. This was the cardinal defect in much of our social legislation which has been declared void. The laws were frequently so imperfectly drawn as to be impossible of administration. Furthermore, the legislature often failed to state the real purpose of the law. While the legislative declaration is assumed to be correct, for the courts to refuse to look beneath the surface and to see what the real object of the act is, can hardly be justified on any other ground than a desire for judicial abdication.

Slight invasions of private rights are frequently sustained even though the only public benefit is administrative convenience, but important interferences can only be justified by some great public necessity. The concept of the balance of convenience between private rights and public welfare runs throughout the entire scope of due process. Indeed, it might even apply in regulations of the procedure of judicial tribunals. The public undoubtedly has an interest in a speedy trial, but it does not follow that to secure this the legislature could ruthlessly cut down

the traditional safeguards of the accused. Some infringements of a slight nature may be justified by a small public benefit, but the benefit to the community must be overwhelming before important private rights can be destroyed.

A final principle of judicial technique in dealing with due process cases involves the question of classification. The concept of equality was one of the first branches to grow from the due process provision and it has had greater application than any of the other principles which the court has evolved. In spite of this fact, it is in a more unsettled condition than almost any other phase of constitutional law. The very nature of the question of equality is such that it practically defies reduction to any systematic rules. There are, however, certain considerations which have great influence on the decision. The legislature is given a wide presumptive discretion in the determination of the subjects to be classified, and the courts will take for their consideration the state of facts which is most favorable to the law. But the classification as made must rest upon some real distinction and not on a whimsical or arbitrary basis. Unless it has some relation to the purpose in hand it can hardly be said to be based on the considerations of fairness and reasonableness which are the foundations upon which due process is built. In the last place, the classification having been once made, it must apply equally to all within the class or else there is the additional problem of re-classification which must conform to the strictest application of the rules governing equality in legislation.

§ 241. The generality of due process of law as a constitutional concept presents a fundamental problem in public law. Where the provisions of the constitution are specific, little question can be raised regarding the nature of the judicial function in applying them. Although there are many who deny that the function of the courts is anything more than a specialized form of administration, this contention need not detain us. All will agree that it is the duty of the courts to apply the law to the cases before

them, and even if it be admitted that other branches of the government perform similar functions, under the American system of organization the performance of this function in the final analysis must devolve on the courts.

The chief point of attack, however, centers around the interpretation of the more general provisions of the constitution. Since these are neither specific nor obvious, the court must use a great deal of discretion in interpreting them. For this reason, many have said that in this instance at least the courts are really exercising the functions of legislation. Since the decisions in social and economic matters, the argument runs, involves matters of expediency and policy, the court in declaring an act contrary to due process of law is in reality setting its judgment against that of the legislative body.[1]

It must be admitted at the outset that the American doctrine of the separation of powers is not to be justified on any grounds of abstract theory. Its real basis in the government as it is now organized rests entirely upon grounds of convenience and expediency rather than on any clear cut inherent differentiation in the nature of various governmental functions.[2] One has but to notice the tremendous overlapping of various functions to realize how impossible it is to justify the granting of some particular function on the sole basis of logical discrimination. This does not imply, however, that the great body of the work performed by any one of the departments of government does not have certain distinguishing characteristics. Although an accurate definition of legislative or judicial functions is impossible, the features of the work of each department can, for practical purposes, be sufficiently distinguished.

1 "As a rule, when the Supreme Court declares a state law unconstitutional under the Amendment, what it really does is not to decide a question of law, but a question of governmental policy. The real question is not whether the legislation is legal, but whether it is wise and expedient, the criterion of wisdom being the opinion of a majority of the Supreme Bench." C. W. Collins, The Fourteenth Amendment and the States (Boston, 1912) p. 168.

2 J. W. Garner, Introduction to Political Science (N. Y., 1910), pp. 420-425; W. F. Dodd, State Government (N. Y., 1922), pp. 75-84.

Broadly speaking the main work of the legislative branch is to formulate rules for social conduct which are permanent, general, prospective, and are recognized as binding on the other organs of government. There are, of course, numerous exceptions to this rule. Much of the time of the legislature is devoted to the consideration of special laws, but these are usually apologized for on the ground that special conditions make a special class inevitable. Likewise, certain legislation has a retrospective effect. But either this feature of the statute is a mere incident, in which case it can be ignored, or else it is unjust and really beyond the sphere of legitimate legislative power.

On the other hand, the judicial function may be described as the application of the law to particular controversies by the rendering of formal decisions. It is true that the administrative branch performs functions very closely related to those ordinarily belonging to the courts, but it is submitted that in so doing they are really acting judicially. In most instances, furthermore, either there is no controversy in the strict sense of the word or the formal element is lacking in the decision.

It is also true that owing to the operation of the doctrine of *stare decisis,* the courts by the painstaking method of deciding case after case have built the great body of our law. It makes little practical difference for the purposes of this discussion if the courts actually make the law or merely discover it. Neither theory is entirely free from difficulty. If the courts discover the law, it may be asked if the legislature does not do the same thing? There are, however, a number of important differences between the technique of legislation and that of judge made law. The first is formal and prospective in its announcement, the latter is specific and retrospective. The first formulates a general rule in written language, the latter only alludes to the principle without formally announcing it. Furthermore, the court works in an empirical manner, having concrete cases before it, while the legislature is not so apt to

be grounded in its decisions on the solid basis of actual controversies. Finally, it is only incidental to the main purpose of the decision (the settlement of the controversy) that the court develops law; their primary function is seldom if ever swallowed by their incidental powers.[3]

On the other hand, the theory that the courts make the law is not entirely without difficulty. If we frankly admit that in laying down a legal rule for the first time, the court acts in a quasi legislative capacity, it would appear at first blush that because practically every case offers some new elements, the judge is continually legislating. This, however, is much too broad a statement if it is applied to the interpretation of the general provisions of the constitution such as the due process clause. The growth in number and influence of legislative commissions, of which the Interstate Commerce Commission is a notable example, has made us familiar with a process of legislative procedure in administrative cases which was undreamed a century ago. Instead of making particular rules for each specific condition, the legislature lays down a general principle and constitutes a commission to enforce it by filling in the administrative details where necessary. In so doing they are acting, strictly speaking, in neither a legislative nor a judicial manner, but in one which is midway between the two.

The work of the court is very similar in cases involving the Fourteenth Amendment. They are given a blanket provision of general import and are asked to fill in the legislative details. This they do, but only within the limits of the blanket provision. There is this difference, however. Even in constitutional questions, the courts generally recognize that they are bound by their former decisions, but administrative commissions have never built the fence of *stare decisis* to hedge their work. Once the decision is rendered and the rule is applied, the functions of

[3] For an excellent discussion of the theory of judicial functions, see B. N. Cardoza, The Nature of The Judicial Process (New Haven, 1922), esp. Lecture III.

the courts as legislators are completed, and it is evident that those functions are exercised only within the narrowest possible limits. Subsequent cases must be decided according to the precedent established, and consequently every decision is a limitation on the legislative power of the courts in the future. When the courts decide a controversy according to an established rule of law, or better, according to recognizable principles, they can be said to be legislating only if we conceive of legislation in the broadest possible terms, and even then the court acts in a very narrow sphere. The whole problem, then, of the function of the courts in applying due process of law simmers down to this: do the courts follow well recognized and ascertainable rules and principles of the law in the decision of constitutional questions, or do they act on the mere basis of policy, whim, caprice, temperament, or what not? If the latter they are merely acting as a third legislative chamber.

The investigations of the preceding chapters give a most conclusive answer to this problem. In the first place, it has appeared throughout the entire development of due process of law that there has been a remarkable continuity of ideas. Due process has always been considered a limitation on all the powers of government, legislative as well as executive. At times certain courts have taken the bit by the teeth and have strained at the tugs of constitutional government, but in the main, the chain of judicial development has been without serious breaks. This of itself creates a *prima facie* case for the proposition that the evolution has been based on certain principles which have tended to assert themselves.

The diffidence of the courts in applying due process of law to new fields is another evidence that they are acting upon principle rather than upon whim. This diffidence appeared not only in regard to special legislation and the police power, but in questions involving the repeal power as well. Indeed, even at the present time, there is abun-

dant evidence of the hesitancy of the courts to bring the limitations of the taxing power and eminent domain under the Fourteenth Amendment. This would indicate that the principles are not settled in the minds of the judges and they prefer to wait until further cases have been presented before taking the first steps along the pathway which may lead beyond their ken. Had the court been acting on mere whim or social philosophy in interpreting this phrase, such tardiness in the development of so fruitful a phrase as due process of law is hardly conceivable. The fact is that even when deciding cases which seemed obviously unconstitutional, they placed their decisions upon almost every other phrase of the fundamental law; and it was only when the relation between due process and the other constitutional principles became obvious, that the two were fused.

But the case goes still further. Beneath the surplusage of judicial verbage certain principles are discernible. Many of these are still in an embryonic state due to the fact that the decisions come from so many jurisdictions which decide cases under such different conditions. Many of the principles have been used only sparingly because but a handful of cases have been presented in which they might have been applied. But in practically every field the courts have attempted, often in a clumsy fashion to be sure, to follow the basic rules of the earlier decisions. That these principles should have been so closely linked with the common law is conclusive evidence of their virility. When we find a body of law which is in the main characterized by remarkable consistency in spite of its close connection with difficult economic and social problems, when we find a judicial body attempting to develop that body of law according to recognized norms of constitutional development, we are not surprised to discover at the heart of the decisions such principles as administrative convenience, balance of convenience, or public purpose.

The function of due process in our fundamental law, therefore can not be conceived in any narrow terms of

protection to a particular class or group. Should the time come when the courts act in such an illegal manner as to warp it in this direction, a remedy will have to be sought. In the meantime, however, it is important to remember that this provision is primarily a guarantee of legality itself, legality not of the formal or superficial kind, but of the fundamental, inherent form which is based upon tested principles of constitutional government. That there has been a constant tendency to widen the channel of this protection is one of the great features of its development. Still more important, however, is the fact that legal principles form the banks of the stream, and the courts by recognizing this, have in reality developed a common law of the constitution.

INDEX

[*References are to Pages.*]

A

ABATEMENT, SUMMARY,
See SUMMARY ABATEMENT.

ABSTRACTS,
city monopoly of business, 534.

ABUTTING OWNERS,
See ASSESSMENTS, SPECIAL; ROADS.

ACCIDENT INSURANCE,
See AUTOMOBILES; INSURANCE; WORKMEN'S COMPENSATION LAWS.

ACCUSATION OF CRIME,
See GRAND JURY; INDICTMENT; INFORMATION; PROCEDURE.

ACQUITTAL,
See DOUBLE JEOPARDY.

ACTS OF CONGRESS,
See CONGRESS; STATUTES.

ADAMS, JOHN,
dangers of unequal legislation, 181.
parliament inferior to Magna Carta, 129.
Stamp Act was unjust classification, 135.

ADAMSON LAW,
validity of, 357-359.

ADAMS, SAMUEL,
advocated resistance to unconstitutional laws, 129.
opposition to Stamp Act, 127, 128.

ADMINISTRATIVE ACTION,
exclusion from jury service because of race by, 270.

ADMINISTRATIVE CONVENIENCE,
admissibility of evidence, 553.
basis for decisions, 420.
restrictive character of, 593.

ADMINISTRATIVE DETERMINATIONS,
finality of, 238.
findings of as evidence of fact, 574, 576, 577.
necessity and expediency in, 239, 240.

ADMINISTRATIVE OFFICERS,
arbitrary actions of, 578.
determination of facts by, 228, 574, 576, 577.

ADMINISTRATIVE PROCEDURE,
error in, 236.
hearing insufficient, 223.
necessity of hearing, 226-228.

[*References are to Pages.*]

ADMINISTRATIVE PROCEDURE—Continued.
need not be formal in police power cases, 228.
notice and hearing required, 220, 226, 233.
police power cases, 226-232.
taxation cases, 220-225.
result must be reasonable, 230.
validity of, 215, 216.

ADMIRALTY COURTS,
colonial attitude toward, 100.
procedure in, 211, 212.

AERIAL BUCKET LINE,
eminent domain for, 477.

AFFIRMATION,
Maryland, 106.

AGREEMENT OF THE PEOPLE,
reflected ideas of Coke, 52.

AGRICULTURAL SOCIETIES,
taxation to aid, 506.

AGRICULTURE,
See Farmers.
credit for, 527, 535.
promotion of as public purpose, 454-467.
taxation to aid, 506, 512.

ALIENS,
admission of, 234, 235.
deportation proceedings, 225, 235.
Fourteenth Amendment, 19.

AMENDMENTS,
See Constitution; United States; Individual Amendments by Number, as "Fourteenth Amendment."
one to ten,
demand for bill of rights not satisfied by, 158, 159.
drafting of, 154-156.
Madison avoided controversial matter in, 158.
proposals for by states, 103, 152-154.
reasons for adopting, 159-161.

AMERICAN BAR ASSOCIATION,
propaganda for reform of Judiciary Act, 581.

AMERICAN REVOLUTION,
causes of, 136.
colonial discard of precedents in, 138, 139.
due process during, 136.
English critics of parliamentary supremacy during, 63.
Magna Carta ignored during, 139.

AMUSEMENT PARKS,
municipal ownership of, 534.

AMUSEMENTS,
See Bowling Alley; Parks; Pool Halls; Theatres.

[*References are to Pages.*]

ANGLO-SAXON,
socialism and traditions of, 590.

ANIMALS,
collection of dead, 332.
railroad to pay for killing, 273.
tuberculosis test for, 553.

ANNOTATIONS,
of federal and state constitutions, 190, 191.

ANTI-FEDERALISTS,
bill of rights as political slogan of, 146-149.
opposition to Constitution, 152.

ANTI-TRUST LAWS,
See Monopolies.

APPEALS
constitutional to Supreme Court, 239, 342, 580, 581.
discrimination in right of, 238.
due process, 236-239.
inadequacy of as corrective of justice, 557, 558.
limitation of, 316.
necessary of, on constitutionality, 239.
quasi-judicial decisions, 341.
right of, 236-239.
state courts to Supreme Court, 342, 580, 581.

APPROPRIATIONS,
See Public Purpose; Taxation.

ARMY,
See Courts Martial.
bonus from town to enlistments in, 520.
foreclosure of mortgages against men in, 348.
public purpose to foster enlistments, 520-523.
supplies for in emergency, 352.

ARREST,
See Grand Jury; Indictment; Procedure.

ASSESSMENTS, SPECIAL,
benefits assumed by court, 445.
benefits necessary, 440-449, 452.
class legislation, 569.
confiscation by, 447-449.
continuing burdens by, 443.
different from taxation, 443.
difficulties of courts with at first, 444, 445.
drainage by, 442, 454-459.
due process, 442-465.
economic benefit, 452.
electric light plant by, 529.
enforced collection of, 443.
equality necessary in, 444, 445.
individual notice required, 221.
irrigation by, 461-465, 569.
jury not needed to levy, 211.
land clearing by, 466, 467.

[*References are to Pages.*]

ASSESSMENTS, SPECIAL—Continued.
levies, 459.
nature of, 440.
payment of, in labor, 458.
personal liability for, 443.
police power, 447, 458.
prevention of erosion by, 460.
private benefit from, 452.
procedure in levying, 211, 220-222.
pumping stations supported by, 443.
reclamation by, 457.
sea-wall by, 460.
sewers by, 453, 454, 567.
sidewalks by, 453.
street improvements by, 442, 445-449.
street sprinkling by, 454.
street sweeping by, 454.
stump pulling by, 466, 467.
sewers upkeep by, 443.
taxation and eminent domain involved in, 444.

ATTAINDER,
See BILLS OF ATTAINDER.

ATTORNEYS AT LAW,
briefs of in police power cases, 549, 550, 570.
class legislation, 267.
opposition to in colonies, 114.
public payments to, 505.
reform of Judiciary Act desired by, 581.
regulation of in Virginia, 114, 115.
representing party at hearing, 226.
test oaths, 311, 312.

AUTOMOBILE,
compulsory accident indemnity, 430.

B

BAIL,
See BONDS, CRIMINAL; PROCEDURE.
validity of high, 110.

BAKERIES,
hours of labor in, 559, 569.
licensing of, 307, 308.
police regulations of, 307.
weight of bread loaves regulated, 539, 540.

BALANCE OF CONVENIENCE,
bakery regulation, 539, 540.
due process requires, 597.
eminent domain cases, 504.
judiciary to determine facts of, 539, 540.
police power limited by, 349, 350.
reasonableness requires, 424.
reserve power limited by, 423-431.

[*References are to Pages.*]

BANK CLERKS,
special procedure for trial of, 260.
BANKRUPTCY,
procedure in cases of, 210, 212.
BANKS,
acts for personal liability strictly construed, 407.
class legislation, 259, 272.
interest rate regulations, 272.
liability of stockholders of, 393, 394, 406, 407.
state owned, 527, 535.
BARBER SHOPS,
judicial notice of long hours in, 545.
Sunday law regulating, 545, 555.
BARRATY,
See Attorneys at Law.
BASTARDS,
See Legitimacy.
BENEFITS,
assessment theory of, 440-449, 454, 466, 467.
constructive in taxation cases, 531.
cooperative improvements, 440-449, 454, 466, 467.
drainage assessments, 454.
individual may mean public, 455.
joint fence laws, 466, 467.
legislative power to determine, 469.
offset of, in eminent domain cases, 195, 196.
public purpose not determined by, 451, 452, 483.
public utilities not characterized by, 469.
special assessments, 440-449, 454, 466, 467.
taxation theory of, 442, 445-449, 531.
BICYCLES,
bridge tolls for, a property right, 422.
BILLBOARDS,
regulation of, 573.
BILLIARDS,
See Pool Halls.
BILL OF ATTAINDER,
due process as restriction on, 85, 140, 202.
BILL OF RIGHTS,
colonial attempts to enact 93-105, 118, 121-124.
colonial drafts not approved by the King, 98-101.
colonial statements loosely drawn, 97, 101.
consideration in state constitutional conventions, 168.
convention of 1787 thought one would be superfluous, 145.
dangers of a federal, 150, 152.
demand for federal, 147, 148, 153.
due process provisions in state, 20-24, 141.
English felt colonial statements useless, 101.
fear that specific statements would not be enough, 153.
Fourteenth Amendment as, 163, 164, 190.
Hamilton on danger of a federal, 150.

[*References are to Pages.*]

BILL OF RIGHTS—Continued.
indefinite character of proposals for, 148.
movement for led by Mason, 146.
nebulous character of demand for federal, 153.
no mention of due process in English, 8.
omission of in Constitution, reasons for, 145, 146.
omission of in Constitution used in anti-federalist campaign, 146.
proposals for federal, 147, 148, 153.
reasons for colonial demand for, 105.
reasons for demand for federal, 145, 146.

BINGHAM, JOHN A.,
drafted Fourteenth Amendment, 162-164.
due process in Fourteenth Amendment taken from Fifth, 163.
familiar with law regarding due process before Civil War, 162, 165.
Fourteenth Amendment, the "Keystone of American Liberty," 164.
meaning of due process as settled, 164.
national supremacy desired, 163.
understood due process provision, 162, 165.

BLACKSTONE, WILLIAM,
definition of law, 258.
influence of, 68, 89, 90, 179.
police power, 300.
procedure according to due process, 82.
supremacy of Parliament, 55, 60.

BLIND,
annuities to aid, 510.

BLUE SKY LAWS,
validity of, 408, 409.

BOARD OF TRADE,
colonial appeals to, 112.
disallowance of colonial laws, 91, 98-101.
increase of activity after 1688, 96.

BOARDS AND COMMISSIONS,
See ADMINISTRATIVE OFFICERS.

BOLINGBROKE, LORD,
influence on colonies, 127, 137.
parliamentary supremacy opposed by, 58.

BONDS,
corporation,
change of, under reserve power, 368.
criminal,
requirement to keep peace, 316.
summary judgment on, 210, 267.
state,
increase of interest rate, 517.

BOOKS,
character of law and political in colonies, 88, 89.
monopoly for furnishing schools, 331.

BOUNTIES,
constitutionality of, 497, 498, 519-523.
coyotes, 497.

[*References are to Pages.*]

BOUNTIES—Continued.
forestry, 497.
salt, 497.
soldiers, 519-523.
sugar, 498.

BOWLING ALLEYS,
regulation of, 315, 571.

BRANDEIS, L. D.,
brief in Muller v. Oregon, 549, 570.
public opinion considered by, 584, 587.
reports of commissions relied on for facts, 577.

BREAD,
See Bakeries; Food.
regulation of weight of loaves, 539, 540.

BRIDGES,
eminent domain used for, 450, 471.
improvements forced on company, 405.
monopoly of toll, 331, 332.
taxation for, 478.

BROKERS,
licensing of, 280-292.
regulation of, 408, 409.

BUILDINGS,
construction regulations, 565, 566.
taxation for public, 505.

BURDEN OF PROOF,
administrative determinations, 228.
class legislation, 551, 564, 573.
police power cases, 557.
presumption of validity, 557, 562, 566, 573, 574, 576.

BURGLAR ALARM,
eminent domain for, 477.

BURIAL OF DEAD,
See Cemeteries.
public purpose of, 512.

BURNT RECORD ACTS,
validity of, 345.

BUSINESS,
See Profession; Property.
loss of, as damage in eminent domain, 515.

BUTTER,
See Oleomargarine.

C

CABINET GOVERNMENT,
condemned by Shebbeare, 61, 62.

CALIFORNIA,
adoption of due process in constitution of, 171-173.
character of population in 1849, 171, 173.

[*References are to Pages.*]

CAMDEN, LORD,
meaning of due process, 85.
parliamentary supremacy opposed, 58.

CANALS,
eminent domain for, 471.
special assessments for, 458.
taxation for, 478.

CARRIERS,
See RAILROADS; SLEEPING CARS; STREET RAILROADS.
extension of lines, 428.
facilities required of, 428.
free passes, 427.
grade crossing regulations, 430, 431.
half fare for children on, 429.
must serve all alike, 472, 473.
public utilities, 470.
railroad as public, 428, 472.
rate regulation of, 230, 431.
script book regulations, 432.
sleeping cars, 427.
soliciting on, 564.
transfer regulations, 429.

CARTA MERCATORIA,
repeal of, 44, 75.

CATTLE,
See STOCK.
railroads to give double damage for killing, 273.
slaughtering of, 330-332.

CATTLE GUARDS,
railroads must maintain, 313, 426.

CATTLE SCALES,
railroads required to install, 428, 560.

CELEBRATIONS,
taxation for historical, 506.

CEMENT PLANT,
municipal ownership of, 533, 534.
state ownership of, 535.

CEMETERIES,
eminent domain for, 503.
regulation of, 307.
reserve power and rights in, 370.
sewer assessments, 567.

CENTRALIZATION,
Fourteenth Amendment as part of movement for, 163.

CERTIORARI,
Supreme Court authorized to issue, 581.

CHANCERY, MASTER IN,
See MASTER IN CHANCERY.

CHARITABLE INSTITUTIONS,
tax to aid private, 507, 508.

[*References are to Pages.*]

CHARITY,
public purpose of, 507-510.
CHARLES I,
attempt to arrest Five Knights, 80.
CHARTER, GREAT,
See MAGNA CARTA.
CHARTERS, COLONIAL,
revocation of, 96.
rights of Englishmen secured by, 9, 90.
unnecessary to secure rights, 103.
William and Mary to Massachusetts, 119.
CHARTERS, CORPORATION,
See CORPORATIONS; RESERVE POWER.
alterations of, 361-433.
contractual character, 361, 362.
cumulative voting, 370.
must be filed, 410.
private contracts involved in, 366.
protection of minority under, 369.
revocation of, 385-392.
bad faith in, 387.
property rights, 389.
removal of cases to federal courts, 388, 389.
strictly construed, 369.
surrender of, 373.
CHARTS,
on Due Process, 28, 29.
CHICAGO,
lake frontage case, 487.
CHILDREN,
See INFANTS.
CHINESE,
class legislation, 268.
CHOATE, J. H.,
argument in Fallbrook Irrigation case, 440, 463.
CHURCH OF ENGLAND,
disestablishment of in Virginia, 196.
CIGARETTES,
state prohibition of, 559.
CITATIONS,
in colonial law cases, 89.
CITIES,
classification by population, 551.
growth of, as cause of development of due process, 338.
judicial notice of location of, 543.
mayor may grant permission to use streets, 552.
CITIZENSHIP,
definition of, in Fourteenth Amendment, 19.
due process as protection of rights of, 206.

[*References are to Pages.*]

CITY PLANNING,
validity of ordinances, 526.

CIVIL CASES,
jury trial not necessary in minor, 209-211.

CIVIL LAW,
basis of levee acts in Louisiana, 460.
Fourteenth Amendment, in Louisiana, 447.
law of the land not, 193.
opposed by colonists, 135.

CIVIL RIGHTS BILL,
constitutionality of, doubtful, 162.
demand for negro, 161.
passed over veto by President Johnson, 162.
purpose of, 161.

CLASS LEGISLATION,
appeals, 238.
assessments, 443-445, 447, 448, 567.
attorneys, 267.
bakeries, 307.
bank which had defaulted, 259.
Blackstone declared was not law, 61.
bond for forfeitures, 267.
building construction, 565.
burden of proof in cases of, 564, 573.
children, 260, 263.
Chinese taxation, 268.
clergymen, 270.
clubs, 326.
coal mines, 558, 559, 565.
common right prohibits, 198.
congressional taxations, 286.
Cooley developed law regarding, 185.
corporations, 378, 391, 416, 565.
costs in tax suits, 272.
courts disliked to enforce, 258, 267.
curative statutes, 262, 263.
dance halls, 326.
debtors, 258.
disestablishment of church, 258.
divorce by legislature, 269.
due process of law, 260-273, 275-294, 442.
employees, 288, 289.
employers by number employed, 567.
evidence that object is not valid, 578.
facts involved in cases of, 538, 539.
farmers' exemption from monopoly statute, 563.
foreign corporations, 378.
future trading law, 564.
grazing licenses, 282.
hotels, 553.
hunting licenses, 282.

[*References are to Pages.*]

CLASS LEGISLATION—Continued.
Indians,
half-breed, 265.
land suits, 260.
inequality not always, 552.
intoxicating liquor, 318, 325.
John Adams on dangers of, 181.
judiciary desired limitation on, 258, 267.
jury service exclusion, 270.
jury service exemptions, 269, 270.
Kent declared contrary to due process, 182.
labor union exemption from trust laws, 566.
landlords, 283.
land titles, 265, 266.
laundries, 563.
legislature,
determination of, reasonable, 551, 565-568.
power to suspend laws, 270.
legitimacy, 264, 265.
licenses, 281, 282, 380-382, 423.
marriage, 264, 265.
monopoly statutes, 267.
farmers' exemption, 563.
labor unions exemption, 566.
natural law prohibits, 257, 258.
negro zoning, 560.
non-residents, 282.
number as a basis of, 551.
officers, 262.
Ordronaux recognized due process as limitation on, 188.
police power, 307, 308.
privileges and immunities clause, 268.
procedure,
judicial, 269.
limitations of, 260, 261, 544.
Stamp Act, 135.
public purpose, 442.
railroads, 273, 341, 564, 567.
remedial statutes, 262, 263.
residence, 281, 282.
revocation of corporate charter, 391.
rules governing, 564.
schools, 276.
script books, 432.
separation of powers, 268.
size as basis, 551, 565.
slaves, 259.
soliciting on trains, 564.
state conventions, 170, 177.
statute of limitations, 257.
summary procedure, 271.
Sundays, 326.
taxation,
Chinese, 268.
congressional, 286.

[*References are to Pages.*]

CLASS LEGISLATION—Continued.
taxation,
procedure, 259, 320.
saloons, 544.
theatres, 565.
unsettled character of law, 598.
Webster claimed due process prohibited, 202.
wills, 259, 260.
women,
hours of labor laws, 268.
removal of hats in theatres, 545.
zoning, 560.

CLOCK,
tax to maintain town, 525.

CLUB HOUSE,
eminent domain for university, 506.

CLUBS,
prohibition of liquor in, 326.

CLERGYMEN,
exemption from jury service, 270.

COAL,
distribution of, not a monopoly, 532.
municipal sale of, 532, 533.
shortage of, an emergency, 352.

COAL MINES,
classification of, 558, 559, 565.
coal screening acts, 414, 570.

COKE, SIR EDWARD,
career of,
commentary on due process, 76.
drafted charter of London Company, 8.
drafted Petition of Right, 81.
Dr. Bonham's Case, 49.
James I, 51.
legal research, 4, 6, 64.
penal promotion, 52.
confirmations of Magna Carta found by, 4, 64.
influence of,
colonies, 88, 89, 107, 111, 125, 128-130, 179, 198.
England, 78, 79, 88.
Inns of Court followed, 88.
wording of due process, 25.
legal views of,
common right as basis of law, 198.
Dr. Bonham's Case, 49.
due process and jury trial identified, 74, 76-78.
due process of law and law of the land identified, 5, 77.
fundamental law in England, 49, 50.
Magna Carta, 32, 33, 78.
parliamentary power, 49, 50.
method of,
historically inaccurate, 79.

[*References are to Pages.*]

COKE, SIR EDWARD—Continued.
method of,
read ideas into Magna Carta, 32, 33, 78.
Otis and doctrines of, 125.
Penn followed legal ideas of, 107.
Stamp Act and doctrines of, 125, 128.
COLLEGES,
change in control of, 367.
combinations of, 367.
regulation of, 369
COLONIES,
administration of ignored, 96.
cases cited in decisions in, 89.
disallowance of laws by Board of Trade, 91.
due process in,
complexity of, 141, 142.
meaning, 106-124, 141.
wording, 8-13.
English Constitution misunderstood, 136.
faith in value of petitioning Parliament, 130.
importance of ideas of, on framers of Constitution, 136.
law in,
character, 87, 95.
sources of, 87-89.
legislature of, limited, 91-105.
Magna Carta,
appealed to, 131, 132, 141.
ignored during war of Revolution, 139.
police power in, 301.
rights of Englishmen claimed, 90.
Stamp Act, opposition to, 127-136.
taxing power of assemblies, 117.
COLORED PERSONS,
See NEGROES.
COMBINATIONS,
See MONOPOLIES.
COMMENTATORS,
See BLACKSTONE; COKE; COOLEY; FREUND; KENT; STORY; etc.
conservatism of, 179, 191.
due process of law, 179-191.
eminent domain and due process, 188, 189.
equality and due process, 294.
few constitutional, before Civil War, 179, 180.
indefiniteness fostered by, 179.
police power and due process, 187.
procedure and due process, 180.
taxation and due process, 188, 189.
COMMERCE,
See INTERSTATE COMMERCE.
COMMISSIONS,
See ADMINISTRATIVE DETERMINATIONS; ADMINISTRATIVE OFFICERS; ADMINISTRATIVE PROCEDURE.
findings of as evidence of facts, 576, 577.
procedure of road, 215.

[*References are to Pages.*]

COMMON CARRIERS,
See Carriers; Railroads; Street Railways.

COMMON DEFENSE,
public purpose, 519-523.

COMMON JUSTICE,
See Justice.

COMMON KNOWLEDGE,
relation to public opinion, 583.

COMMON LAW,
American government based on, 253, 331.
Charles I and procedure according, 81.
Coke on due process and principles of, 77.
colonists,
due process, 77, 123, 135, 140, 142.
Magna Carta founded on, 134, 137.
procedure under, as due process, 134, 140.
protection of, claimed, 90.
Cooley recognized as guide for due process, 185.
courts rely on in interpreting due process, 249, 254.
development of concept of due process, 241-245.
due process, 175, 241-245, 249, 333, 596, 603.
definite basis given to, 254.
disadvantages of, as test, 245.
founded on, 179.
procedure at, 134, 140, 182, 193, 593.
substance not form of, 245-247.
Dulany said due process was declaration of, 103.
employer's liability at, 248-250.
English constitution based on, 46.
federal bill of rights to protect principles of, 149.
federal bill of rights to secure, 147.
flexibility of as norm for due process, 245.
framers of Fourteenth Amendment thought due process included, 163.
grade crossing rule, 402.
influence on development of due process, 241-245.
judicial notice,
originated in, 543, 544.
rules of, taken as, 545.
judicial review, 563.
law of the land, 75, 134, 140, 142.
legislature can change, 248, 289.
liquor regulations at, 318.
Magna Carta, 134, 137.
mill acts based on, 490.
monopolies under, 415.
natural law, 47.
norm of due process, 242-245, 254.
notice and hearing, 208.
police power, 300, 313, 314, 316.
procedure,
Charles I, 81.
due process as, 134, 140, 193, 593.

[*References are to Pages.*]

COMMON LAW—Continued.
procedure,
inadequate to enforce liquor legislation, 217.
indictment, 108, 109.
notice and hearing, 208.
struck jury, 248.
summary, 311.
property rights protected by, 582.
public policy, principles of, 253.
public utilities recognized at, 469, 470.
Story said process must be according to, 180.
struck jury, 248.
summary procedure under, 311.
vested rights protected by, 200.
workmen's compensation rules, 248-250.

COMMON RIGHT,
judicial interpretation of, 198-200.
vested rights protected by, 201.

COMMON SENSE,
due process as, 181.

COMMUNE CONCILIUM,
unsuited to enforce Magna Carta, 38.

COMMUNICATION,
public purpose, 449-453, 456, 471-498, 525.

COMPENSATION FOR PROPERTY TAKEN,
See Confiscation; Eminent Domain.

COMPETITION,
See Monopolies.

CONDEMNATION OF PROPERTY,
See Eminent Domain.

CONFIRMATIO CARTARUM,
cited by Lord Ellesmere, 51.
excommunicated any breaking Magna Carta, 39.

CONFIRMATIONS OF MAGNA CARTA,
Coke found more than thirty, 4, 64.
omitted enforcement provisions, 37.

CONFISCATION,
church lands by disestablishment, 196.
discriminatory license fees, 381.
due process, 116, 193, 206, 214, 226.
emergency, 351.
intoxicating liquor, 316-320.
land,
church, 196.
private, 193.
state university, 197.
uncultivated, 265.
Magna Carta aimed to prohibit, 71.
rate regulation may cause, 429.
reserve power, 417-420.
taxation distinguished from, 438.
uncultivated land, 265.
Webster claimed contrary to due process, 202.

[*References are to Pages.*]

CONGESTION,
relief of, as public purpose, 527.

CONGRESS,
amendments suggested to first, 152.
Bill of Rights demanded to limit, 147, 151, 154, 155, 157.
class legislation by, 286.
committee reports as source of facts, 577.
conclusive determination of public purpose by, 516.
drafting of Fifth Amendment, 154-156.
few acts of, held contrary to due process, 205.
Fifth Amendment limitation on, 204.
first act of, held void as not due process, 205.
Fourteenth Amendment no limit on, 280.
Jefferson demanded Bill of Rights to curb power of, 157.
Madison claimed Bill of Rights would restrict, 155.
Madison predicted unwieldy House, 155.
Paschal said due process limited, 183.
powers of,
fear of, 147, 151, 154, 157.
Fourteenth Amendment increased, 167.
importance, 148.
postal, 293, 294.
taxation, 286, 496-498.
views on due process,
during Reconstruction, 162, 163, 166, 167.
equality provision specially desired, 275.
ignorance of, 162, 163, 166.
indefiniteness of, 165.
meaning of property, 165.

CONJECTURAL BENEFITS AND DANGERS,
legislation, 351.
public purpose, 452.

CONKLING, ROSCOE,
familiar with state due process decisions before Civil War, 165.
Fourteenth Amendment protected corporations, 164.

CONNECTICUT,
due process,
adopted in 1650, 10.
fundamental law of and similar provision, 26.
Massachusetts Body of Liberties copied by, 95.

CONRAD II,
Canon of 1037, 1.

CONSEQUENTIAL INJURIES,
due process, 330.

CONSERVATION,
See DRAINAGE; ECONOMIC BENEFITS; IRRIGATION.
police power, 464.
regulations for, 570.

CONSOLIDATED GAS CASE,
bulky brief in, 549, 550.

[*References are to Pages.*]

CONSTITUTIONAL CONSTRUCTION,
framers of Northwest Ordinance did not observe rules, 144.
rules of, 276, 295.

CONSTITUTIONAL CONVENTIONS,
attempts to make due process specific, 170, 171, 174.
attempts to modify due process in recent, 177.
attempt to repeal due process, 176.
California consideration of due process, 172.
debates in, 168.
discussion of due process in recent, meagre, 176.
federal,
due process not considered by, 145.
police power, 301.
Illinois attempt to make due process specific, 174.
interpretations of due process borrowed from courts, 177.
Iowa, due process, 176.
journals of first not published, 168.
Maryland, scope of due process, 174, 175.
Massachusetts, consideration of due process, 175, 176.
members poorly informed on legal questions, 170.
minor amendments to due process provision, 169.
New York attempt to make due process specific, 170.
obligation of contracts clause, 363.
sources of information on, 168.

CONSTITUTIONAL LAW,
appeals permitted on, 239.
confused character of before Civil War, 184.
Cooley's influence on, 184.
flexibility in, 584.
Fourteenth Amendment unified, 25.

CONSTITUTION, ENGLISH,
See ENGLAND; MAGNA CARTA; PARLIAMENT.
colonists,
appeals to principles of, 129, 132, 133.
Parliament limited by, 127, 138.
praised by, 127, 140.
rights claimed under, 135.
spirit of was superior to Magna Carta, 138.
Stamp Act violated principles of, 132, 133, 135.
common law as basis of, 46.
development,
idea of fundamental law,
in colonies, 127.
in England, 46-70.
judicial power under Coke, 48-50.
"law of the land" the cornerstone of, 135.
Magna Carta,
fundamental law of, 51-53.
part of still, 66.
reflection of, 30.
natural rights as element of, 47, 144.
periods of crisis under, few, 71.
Stamp Act declared contrary to principles of, 132, 133, 135.

[*References are to Pages.*]

CONSTITUTION, STATE,
adoption of due process in, 1, 20, 28, 29, 168-178.
annotations of, 190, 191.
antiquated provisions persist in, 437.
charts of due process in, 28, 29.
class legislation limited by, 273.
Declaration of Independence copied, 267.
eminent domain restrictions of, 434, 435.
equality provisions overshadowed by,
Fourteenth Amendment, 277.
Fifth Amendment copied, 18.
Fourteenth Amendment copied, 23.
grants prohibited by,
manufacturing, 496.
railroads, 489.
legislative divorces prohibited by, 269.
list of states without due process clause in Constitution, 20.
Magna Carta influenced, 21-24.
monopolies prohibited by, 331.
New York influence, 22-23.
procedure under, 197.
reservation of power to amend charters, 364, 365.
special legislation prohibited by, 25, 267.
specific provisions retarded due process development, 437, 438.
Supreme Court will take state courts interpretation of, 487, 579.
table of dates of adoption of due process provisions in, 26, 27.
taxation provisions of, 435-438.
types of due process clauses in, 14, 15, 21-24.
value of due process provision in, 24, 25.
Virginia Declaration of Rights (1776) influence, 21.
wording of due process in, 14, 15, 21-24.
CONSTITUTION, UNITED STATES,
adoption of, 147-153.
amendments,
Fifth Amendment, text of, 16.
first ten,
do not limit states, 18, 163.
ratification of, 16.
Fourteenth Amendment and state constitutions, 23.
Fourteenth Amendment, text of, 18.
proposed by states, 16.
annotations of, 190, 191.
Bill of Rights demanded, 16, 144.
emergencies, 348.
eminent domain restriction of, 434.
formation of, 145-147.
Hamilton's interpretation of preamble, 166.
importance of ideas of colonists on framers of, 136.
indefinite character of opposition to, 148.
influence on state constitutions, 20, 21, 23.
objected to because of lack of Bill of Rights, 16, 144.
originally contained few protections of private rights, 15.

[*References are to Pages.*]

CONSTITUTION, UNITED STATES—Continued.
preamble,
courts have not expanded, 166.
police power, 301.
privileges and immunities clause, 268.
ratified by special conventions, 150.
Sumner's interpretation of "Republican form of government," 166.
taxation provisions of, 435.
trial by jury provision, 144.
wording of due process of law in, 15-19.
CONSTRUCTION,
acts creating utilities, 499, 500.
acts imposing personal liability on bank stockholders, 407.
appeals permitted to courts by, 230.
arbitrary effect of statutes eliminated by, 196, 201.
corporate grant strictly construed, 369.
notice and hearing secured by, 240.
prospective to conserve vested rights, 201, 263.
reserve power, 432.
rules of, 276, 295.
states before Fourteenth Amendment, 163.
Supreme Court will adopt that of state court on state laws, 487, 579.
CONSTRUCTIVE BENEFIT,
in taxation cases, 531.
CONTEMPT,
hearing necessary for indirect, 226.
legislative, 54.
notice and hearing necessary in cases of, 209, 226.
Penn on summary procedure, 107.
punishment for, by legislature is valid, 54.
summary procedure in cases of, 107, 209, 226.
CONTINENTAL CONGRESS,
Magna Carta appealed to, 12, 137.
CONTINUITY,
of due process development, 602.
CONTRACTS,
See Obligation of Contract.
breach of by legislature and due process, 112.
corporation held to, even if voidable under statute, 411.
increase in consideration of state, 517.
monopoly made voidable, 416.
tax exemptions as part of, 383, 384.
voidable if corporation has not filed charter, 410, 411.
CONVENTIONS, CONSTITUTIONAL,
See Constitutional Conventions.
CONVICT,
damages to pardoned, 517.
COOLEY, T. M.,
based ideas on study of cases, 184.
common law as basis of due process, 185, 245.
constitutional writer, 184-188.
developed law regarding class legislation, 185.
diversity of interpretation of due process, 163.

[*References are to Pages.*]

COOLEY, T. M.—Continued.
due process limited all branches of government, 184.
eminent domain limited by due process, 185.
equality provision, 294.
expressed dominant legal ideas of time, 186.
importance of writings of, 184-188.
influence of, 186-188.
legislative determination of facts, 568.
limitations of work, 188, 244.
Murray Case, 244.
originality of ideas of, 179.
police power limited by due process, 185.
prediction regarding reserve power, 365.
public opinion in constitutional cases, 582.
public purpose necessary to due process, 186.
reason for Fourteenth Amendment, 275.
scope of reserve power, 365, 417-420.
shifted emphasis from personal to property rights, 185.
taxation,
limited by due process, 185.
railroads aid, 482.

COOPERATIVE IMPROVEMENT,
basis of Fallbrook Irrigation case, 463, 464.
public purpose, 460, 466, 467.

COOPERATIVE SOCIETIES,
exemption of, from Lever Act, 282.

CORNBURY, GOVERNOR,
inefficient administration of, 119-121.
removal of, 121.

CORPORATIONS,
See Banks; Charters; Contracts, Obligation of Contract; Reserve Power.
additional privileges granted under reserve power, 367.
amendments to charter, see Reserve Power.
assessability of stock, 371, 407.
automatic dissolution laws, 385.
blue sky laws, 408, 409.
capitalization increase, 368.
change of stock assessability, 371, 407.
charters,
alteration of, 361-433.
contracts involved in, 366.
contractual character, 361, 362.
revocation of, 385-392.
strictly construed, 369.
surrender of, 373.
classifications of, 378, 380-382, 565.
collection of debts from defunct, 366.
combinations of,
forcing, 367, 368.
prevention, 415.
contracts involved in charters, 366.
creditor, rights of, 389, 390,

[*References are to Pages.*]

CORPORATIONS—Continued.
cumulative voting, 370, 371.
Dartmouth College Case, 362.
dissolution of, 385-392.
dividends,
can not be impaired under reserve power, 371.
payment of from capital stock prohibited, 369.
division of, 368.
due process as protection of, 164, 196, 290, 419, 594.
existence after dissolution to wind up affairs, 389, 390.
Fourteenth Amendment framed broadly to protect, 164.
franchises, leasing of, 370.
franchises, property, 420-423.
imposition of new functions for public welfare, 372, 373.
intangible property of protected by due process, 420.
labor regulations, 411-415.
laws may be changed under reserve power, 377.
license fees,
discriminatory, 380-382.
new corporations, 378.
life and liberty of, not protected by due process, 209, 419.
mismanagement of, 369, 386.
mutualizing insurance, under reserve power, 369.
name of, not a property right, 422.
new functions can not be forced on, 372, 373.
non-use of charter, repeal for, 386, 387.
police power, 386.
powers,
to cease business, 407.
increase of, 366-369.
judicial, can not be given, 48.
process, service of, 409-411.
property,
confiscation prohibited, 417-420.
dividends, 371.
franchise, 420-423.
intangible, 420.
name, 422.
revocation of charter, 389.
public improvements by, 427-429.
removal of cases to federal courts, 388, 389.
repeal power and Dartmouth College Case, 361-365.
service letter law, 415.
speculation prevented, 370.
state can form, 378-380.
stockholders,
assessability, 371, 407.
liability, 393, 394, 406, 407.
store order legislation, 414.
taxation of, 374-385.
tax exemption, repeal of, 374-377, 382, 385.
transfer of corporate rights, 369.
vested rights of minority protected by reserve power, 370.
Wage payment regulations, 432.

[*References are to Pages.*]

COSTS,
assessment of without hearing, 228.
COUNCIL, MUNICIPAL,
See MUNICIPAL COUNCIL.
COUNSELORS,
See ATTORNEYS AT LAW.
COUNTY CLERK,
deprivation of office of, 262.
COUNTY SEAT,
tax to compensate for losses due to removal, 517.
COURT OF HIGH COMMISSION,
creation of, 6, 73.
COURT OF STAR CHAMBER,
abolition of, 7, 81.
caused no protest at first, 73.
creation by Henry VII, 6, 46.
reason for abolition, 52.
violation of Magna Carta by, 7.
COURTS,
See JUDICIARY; PROCEDURE.
COURTS MARTIAL,
proceedings in, 211.
COYOTES,
bounty for killing, 497.
CREDIT,
regulation of corporations dealing with public, 393, 394.
CREDITORS,
change in monetary system affecting, 329.
protection of corporations, 394, 408.
CRIMINAL PROCEDURE,
See PROCEDURE, CRIMINAL.
CROSSINGS,
See GRADE CROSSINGS; RAILROADS.
CROWN LANDS,
reversion of, 122.
CUMULATIVE VOTING,
imposition of, under reserve power, 370, 371.
New Jersey rule on, 371.
CURATIVE STATUTES,
class legislation, 262, 263.
validity of, 260.
CUSTOMS,
importance of, in constitutional cases, 584.
relation of law to, 582.
CYCLONE,
public aid after, 512.

D

DAMAGES,
can not be assessed without hearing, 228.

[*References are to Pages.*]

DAMS,
See MILLS; STREAMS; WATER POWER.
eminent domain for mill, 455, 489.
fishways required over, 427.
revocation of right to build, 455.

DANCE HALLS,
prohibition of liquor in, 326.

DARTMOUTH COLLEGE CASE,
circumstances of, 361.
criticism of, 362.
implications of, 362, 363.
popularity of, 362.
resistance to doctrine in Ohio, 362.

DEAD,
See CEMETERIES.
burial of, as public purpose, 512.

DEBTOR,
See CONTRACTS.
imprisonment of, in England, 75.
special act releasing from jail, 258.

DECLARATION OF INDEPENDENCE,
See REVOLUTION.
due process linked with, 272, 273.
equality demanded, 272.
equality provision of, applied by some courts, 267.
protest against supremacy of Parliament, 136.
trial by jury in, 13.

DECLARATION OF RIGHTS,
See BILL OF RIGHTS.

DEFENSE,
a national function, 522, 523.
public purpose, 519-523.

DEFINITENESS,
courts prefer constitutional norms with, 469.
efforts to secure in due process, 595.
exactness not necessary, 357.
required of statutes, 356.
state court determines if law has, 579.

DEFINITIONS,
citizenship in Fourteenth Amendment, 19.
due process, 283, 287, 320.
courts hesitate to give, 192.
exclusion and inclusion, 359.
Justice Johnson's, 192.
left to courts, 165.
Webster's, 202.
emergency, 351-355.
equal protection of the law, 276, 290.
law, 258.
moral obligation, 513.
police power, 302-306, 335, 336.

[*References are to Pages.*]

DEFINITIONS—Continued.
public purpose, 536.
public utility, 468-471, 474, 475.
quasi-judicial determinations, 226.
quasi-legislative determinations, 226.

DELAWARE,
due process of law in Charter of 1701, 10.

DE LA WARR, LORD,
instructions of, called a Magna Carta, 92.

DELEGATION OF LEGISLATIVE POWER,
See ADMINISTRATIVE OFFICERS.
due process of law, 86.
Locke on dangers of, 58.
special assessment districts, 440, 441.

DEPARTMENTS OF GOVERNMENT,
See ADMINISTRATIVE OFFICERS; GOVERNMENT.

DEPENDENTS,
taxation for care of, 507, 508.

DEPORTATION,
procedure in cases of, 225, 235.

DEPRIVATION OF PROPERTY,
See CONFISCATION; PROPERTY.

DIRECT ACTION,
danger of, 358.

DISALLOWANCE,
Bill of Rights of New York, 98.
colonial laws by Board of Trade, 91.
due process in colonial Pennsylvania, 99-101.
Massachusetts Act of Privileges, 98.

DISCRETION,
court's, in applying due process, 599.
delegation of unregulated, 340.

DISCRIMINATION,
See CLASS LEGISLATION; EQUALITY; EQUAL PROTECTION OF THE LAW.

DISEASED PERSONS,
jury trial not necessary for confinement of, 209, 210.

DISPENSARY,
validity of statute, 525, 526.

DISSOLUTION OF CORPORATIONS,
See CORPORATIONS; RESERVE POWER.

DISTRESS WARRANTS,
See PROCEDURE; SUMMARY PROCEDURE; TAXATION.
taxation cases, 242-245.
English usage, 243.
validity of, 193.

DIVORCE,
power of legislature to grant, 269.

[*References are to Pages.*]

DOCKS,
See NAVIGATION; SHIPPING.
eminent domain for, 477.
DOGS,
taxes for sheep fund, 424, 425.
DONGAN, GOVERNOR,
instructed to recognize right of colonies to tax themselves, 118.
DOUBLE JEOPARDY,
due process, 290.
Rawle declared due process protected from, 180.
DRAFT,
See ARMY.
DRAINAGE,
See LEVEES; RECLAMATION; SEWERS.
assessments for, 454-459.
assumed to be for public health, 459.
benefit of, to land, 454.
California act for, 458.
eminent domain for, 524, 526.
judicial notice of common law rule, 545.
public purpose in, 454-459.
swamp, by special assessment, 442.
taxation for, 524, 526.
DRED SCOTT DECISION,
character of, 327.
influence on legal thought, 337.
political effects of, 328.
DRUNKARDS,
jury trial unnecessary to confine, 210.
prohibition of sale of liquor to, 326.
reformatories for, 544.
tax for care of habitual, 507.
treatment of habitual, 507, 508.
DUE COURSE OF LAW,
covers part of ground of due process, 22, 24, 25.
DUELS,
police regulation of, 311, 312.
DUE PROCESS,
See FIFTH AMENDMENT; FOURTEENTH AMENDMENT.
agreement on,
Fifth Amendment, 159.
Fourteenth Amendment, 164.
attempts to enact in colonies, 97-105.
campaign for adoption of Constitution, not mentioned during, 147.
causes for wide adoption in State Constitutions, 20.
class legislation, 261.
Coke identified with law of land, 77.
Coke said included principles of common law, 77.
colonies,
concept of, indefinite, 141.
general language preferred, 102, 105.

[*References are to Pages.*]

DUE PROCESS—Continued.
colonies,
wording of phrase in, 8-13, 101.
colonists did not define, 123.
commentators overlooked, 179.
Congress left definition of, to courts, 165.
definiteness in interpretation desirable, 255.
definitions of, 192, 202, 283, 287, 320, 359
Delaware charter (1701), 10.
delegation of legislative power, 440, 441.
development of,
character, 590.
chart showing, 28, 29.
continuity, 602.
due to needs of courts, 273.
periods of stress, 344.
police power, 306-328, 337.
railroad grants, 479-489.
slowness of, 437, 492-496.
tendencies of,
judiciary broadens, 432, 433.
restrictive, 592, 593.
difficulties in ignoring, 494, 495.
diversity of state interpretation before Civil War, 163.
eminent domain,
ignored at first, 471-474.
relationship of, 437, 438.
English view in Seventeenth Century as a sum of liberty, 84.
equal protection,
confused with, 279, 287.
included in, 276-279.
relation to, 162, 256-260, 276-279.
supplementary to, 162, 277, 278.
equal protection of law,
in State courts, 277.
in Supreme Court, 284-292.
first attempt to interpret by Lord Coke, 77.
first use in America in the Massachusetts Act of Privileges, 97.
first use in American Constitution in Fifth Amendment, 16.
first use of phrase, 4.
formal requirements not enough, 433.
framers of Fourteenth Amendment said meaning was settled, 164.
function of court in applying, 598-604.
importance of, in border line cases, 461.
included in Fourteenth Amendment to give a broad protection, 163, 164.
increased use of, 592.
by attorneys, 337.
in State Constitutions, 20.
law of the land, 5, 57, 77, 175, 176, 272, 589.
limit on all powers of government, 594, 595.
Magna Carta, c. 39, 39.
aimed to curb execution before judgment, 33.
context of, in, 31.
most important provision, 31.
Maryland colonial assembly attempted to interpret it, 102.

[*References are to Pages.*]

DUE PROCESS—Continued.
Maryland provision in Declaration of Rights **(1776), 15.**
Massachusetts Body of Liberties, 9.
Massachusetts provision (1790), 21.
meaning, 320.
constant in England, 71-86.
"law of the land," 5.
taken for granted by,
first judicial decisions, 192.
framers of Fourteenth Amendment, 164-166.
framers of the Fifth Amendment, 155, 156.
legal writers, 179.
State Conventions, 168.
mill acts cases ignored, 491, 492.
Minnesota provision (1858), 23.
Mississippi provision (1817), 22.
modification attempts,
England, 84, 85.
Massachusetts, 176.
state conventions, 169, 172, 177, 178.
natural justice, 200.
New Haven agreement (1643), 10.
New Jersey colonial provisions, 11, 12.
New York charters (1683, 1691), 11.
New York Constitution (1777), 15.
Oklahoma provision (1907), 23, 24.
origin of, 589.
Pennsylvania proposed federal section on, 149.
phraseology fixed in England by 1629, 8.
police power, 306-328, 337, 542.
principles of, 596-598.
privileges and immunities, 408.
public purpose not an outgrowth of, 441.
reserve power, 417-420.
residual character of concept, 75, 86, 591-593.
scope of, extended, 36, 37, 591.
separation of powers, 418.
social guarantee of, 590.
state constitutions, increased use in, 20.
state conventions seldom discussed, 169.
states with provision in Constitution, list, 26, 27.
summary of procedural protections, 180.
table showing dates of adoption of due process clauses by states, 26, 27.
taxation, 437, 438, 479, 480.
Tennessee provision (1796), 21.
Texas provision (1845), 22.
types of clauses in state Constitutions, 14, 15, 20-24.
value of protection, 24, 25, 602-604.
Virginia Declaration of Rights (1776), 14.
virility of phrase, 273.
West Virginia provision (1873), 23.
wording of phrase,
England, 1-8.
colonies, 8-13.

[*References are to Pages.*]

DUE PROCESS—Continued.
wording of phrase,
state Constitutions, 21-24.
United States Constitution, 15, 17, 163.
Young declared meaning easily understood, 179.
DULANY, DANIEL,
colonists had rights of Englishmen, 103.
due process included notice and hearing, 111.
illegal taxation violated common law, 131.
DYRE, MAJOR WILLIAM,
indictment of, 117, 118.

E

ECONOMIC BENEFITS,
public purpose of, 452, 458, 461, 462, 464, 465, 473, 490, 491, 511, 536, 560.
ECONOMIC CONDITIONS,
influence on development of due process, 191, 338.
ECONOMISTS,
facts gathered by, used by courts, 577.
EDUCATION,
See SCHOOLS.
public purpose of, 505, 506.
EDWARD I,
issued Confirmatio Cartarum, 4.
justices appointed to enforce Magna Carta, 42.
model Parliament called, 38.
EDWARD III,
"due process" extended to protect all "men," 37.
"due process of law" used by, 4.
extraordinary procedure in emergency justified by, 72.
EJUSDEM GENERIS RULE,
Federal Constitution, 150, 160.
ELECTIONS,
congressional powers of regulating, 151.
ELECTRIC APPLIANCES,
sale of by city, 529, 534.
ELECTRIC POWER,
See WATER POWER.
characteristics of, 501.
public utility, 499-503.
ELECTRIC POWER LINE,
See POWER LINE.
ELECTROCUTION,
murder penalty upheld, 246.
ELEEMOSYNARY INSTITUTIONS,
tax to aid private, 507, 508.
ELEVATORS,
railroad rights of way, 341.
rate regulation of, 333.

[*References are to Pages.*]

ELEVATORS, GRAIN,
eminent domain for, 475, 503.
public ownership of, 535.
public utility, 333, 535.
ELIZABETH,
patents to Gilbert and Raleigh, 8.
EMERGENCY,
acts passed during, must be definite, 356, 357.
Adamson law, 357-359.
balance of convenience and doctrine of, 350.
common law and procedure in, 42, 72.
constitutional rights during, 344-360.
creates no new power, 348, 355.
definition, 351-355.
destruction of property,
compensation for, 345.
fires, 227, 228, 308, 345.
riots, 355.
war, 334-336.
discharge of union men, 347.
features of, 351-355.
fires, 227, 228, 308, 345.
hypothetical, 351.
judicial notice of, 546, 547.
legislation in, must be directed toward, 355.
military measures in, 345, 346.
municipal coal yards in, 533.
nature of,
extreme situation existing, 348.
limited character, 542.
permits of no delay, 351.
temporary character, 352-354.
police power, 344-360.
power not created by, 348, 355.
private rights not suspended in, 348.
procedure in, 42, 72, 183, 226-228.
proof of existence of, 351-355.
public necessity and doctrine of, 349.
removal of articles in war, 344.
rent laws, 283.
riots, 355.
summary procedure valid in, 183, 226-228.
supplies for army in, 352.
taxation for relief in, 511-513.
vaccination in time of, 346-348.
war creates, 344-346, 352.
EMINENT DOMAIN,
See CONFISCATION; PUBLIC PURPOSE; TAXATION.
abuse of power in New York, 266.
aerial bucket line, 477.
assessments and power of, 447.
balance of convenience in, 504.
benefits offset, 195, 196.

[*References are to Pages.*]

EMINENT DOMAIN—Continued.
bridges, 471.
burglar alarm, 477.
canals, 471.
cemeteries, 503.
city planning, 526.
club house, university, 506.
common law, 330.
common rights, 198.
compensation,
benefits offset, 195, 196.
requirement of, 194, 195, 198, 266.
Cooley on due process, 185, 186.
dams for mill site, 455.
drainage, 454-459, 524, 526.
due process restricts power of, 195, 196, 198, 215, 266, 296-298, 341, 437, 438, 594.
commentators on, 188, 189.
Cooley, 186.
Fourteenth Amendment, 164.
state conventions, 177.
Webster, 202.
electric power line, 477, 499-503.
elevator, grain, 341, 475, 503.
emergency, 345, 351.
express companies, 475.
ferries, 471, 472.
fishing rights, 524.
flumes for logging, 477.
Fourteenth Amendment, 164, 296-298.
franchise rights, 422.
garbage disposal site, 529.
grocery, 496.
grade crossings abolished by, 475.
hearing required in cases of, 222-224.
highways, 195, 215, 449-451, 471, 475, 527.
hospitals, 513.
irrigation, 461, 465, 528.
jury trial, 211.
levees, 459, 460.
library, 506.
lighthouse, 505.
limitations on, 434, 435, 482.
loss of business as damage, 515.
lumbering, 477, 503.
mills, 455, 472, 489, 490, 496.
mines, 477, 478, 503.
navigation, 330, 477, 505.
offset of benefits, 195, 196.
oiling station, 496.
oyster beds, 524.
parks, 524.
pipe lines, 476.
playgrounds, 506, 524.

[*References are to Pages.*]

EMINENT DOMAIN—Continued.
police power, 307, 313, 447.
postoffice, 505.
power line, 477, 499-503.
private docks, 477.
private railroads, 473, 476.
private roads, 450.
private water power, 502.
procedure,
jury trial, 211.
hearing, 222-224.
road commissions, 215.
summary, prohibited, 482.
public buildings, 505.
public purpose, 434, 435, 471-479.
health, 453, 454, 457.
irrigation, 461-465, 528.
relief of congestion, 527.
public utilities may use, 470-478.
railroads, 471-476.
access to car barns, 475.
double track, 475.
freight, 473.
freight facilities, 475.
grade crossings, 475.
passenger, 473.
pleasure, 478.
private spurs, 473, 476.
reservoirs, 475.
side tracks, 475.
stations, 475.
terminal facilities, 474.
topographical changes by, 475.
reservoirs, 475.
restriction on, 434, 435, 482.
roads, 195, 215, 449-451, 471, 475, 527.
schools, 506.
sewers, 524.
stone quarry, 524.
street lighting, 450, 451.
street railroads, 475.
streets, 195, 215, 449-451, 471, 475, 527.
subway, 477.
summary procedure, 222-224, 482.
taxation, 441, 444, 482-484.
telegraph, 477.
telephone, 477.
terminal facilities for railroads, 474.
tunnel, 477.
university, 506.
water power, 477, 499-503.
water works, 496, 500.

EMPLOYEES,
See Labor; Workers; Workmen's Compensation.

[*References are to Pages.*]

EMPLOYER'S LIABILITY,
See Workmen's Compensation Act.
EMPLOYMENT,
increase of, as public purpose, 455.
EMPLOYMENT AGENCIES,
regulation of, 560, 561.
ENGINEERS,
evidence of, in rate fixing cases, 576.
ENGLAND,
See Constitution; English; Magna Carta; Parliament.
fundamental law of, 46-70.
judicial review in, 48-53, 69.
Magna Carta in, 30-45.
meaning of due process in, 71-86.
parliamentary supremacy in, 53-70.
wording of due process of law in, 1-8.
EPILEPTICS,
intermarriage of, 570.
EPISCOPAL CHURCH,
act disestablishing in Virginia, 257.
EQUALITY,
See Class Legislation; Equal Protection; Special Legislation.
Adams, J., on necessity of, in statutes, 181.
appeals to courts, 238.
assessments, 444, 445.
colonists on, 135.
development of relation to due process, 266, 267.
due process, 256-299, 598.
colonists, 135.
development of, 256-260, 266, 267, 275.
New York, 170.
Ordronaux on, 188.
overshadowed by specific provisions, 278.
public purpose, 442.
state conventions, 177.
Supreme Court, 284-292.
Webster, 202.
Fourteenth Amendment, 18, 19, 162-164, 277.
Kent on due process, 182.
mathematical nicety not required, 551, 552.
natural law, 257, 258.
Ordronaux on connection with due process, 188.
privileges and immunities clause, 268.
separation of powers, 268.
Stamp Act, 135.
state conventions, 177.
state constitutional provisions, 256, 277.
unsettled character of principle, 598.
EQUALITY OF OPPORTUNITY,
public purpose, 536.

[*References are to Pages.*]

EQUAL PROTECTION OF THE LAW,
See CLASS LEGISLATION; EQUALITY; SPECIAL LEGISLATION.
Congress not limited by, 280.
drafting of clause, 161-167.
due process, 14, 276-279, 287.
Fourteenth Amendment provides for, 14, 161, 162, 275, 277.
framers attitude toward, 161, 162.
judicial decisions lumped with due process, 278.
overshadows equality features of due process, 278.
proposed before due process in Fourteenth Amendment, 277.
reasons for adopting, 275, 276.

EROSION,
prevention of as public purpose, 460.

ESPIONAGE ACT,
validity of, 346.

ESTATES,
jury trial unnecessary in administration of, 210.

EVIDENCE,
See BURDEN OF PROOF; FACTS.
administrative body's use of, 228.
rules of courts for taking, in police power cases, 551-561.

EXCOMMUNICATION,
used to enforce Magna Carta, 38, 39, 130.

EXECUTION,
See PROCEDURE.

EXECUTIVE,
due process a limit on, 109, 474.
legislative power of, in mediæval England, 42.
power to levy taxes,
colonial New Jersey, 119-121.
colonial New York, 117, 118.
Massachusetts, 118, 119.
resisted in England, 81, 121.

EXECUTIVE OFFICERS,
See ADMINISTRATIVE OFFICERS; DEPARTMENTS OF GOVERNMENT.

EXEMPTIONS,
See CLASS LEGISLATION; EQUALITY; SPECIAL LEGISLATION; TAXATION, EXEMPTIONS.

EXILE,
no power of legislature to, under due process, 174.

EX PARTE,
validity of hearings, 224-226.

EXPECTANCY,
right in, 264, 265.

EXPENDITURES,
See PUBLIC PURPOSE; TAXATION.

EXPLOSIVES,
regulations of, 301, 302.

EXPOSITIONS,
taxation for, 506.

[*References are to Pages.*]

EX POST FACTO,
common right, 198.
curative acts, 204.
due process, 166, 183.
judiciary attempted to expand meaning, 166.
partial invalidity of laws, 554.
police power limitation, 314.
test oath acts, 312.

EXPRESS COMPANIES,
eminent domain for, 475.

EXPROPRIATION,
See Eminent Domain.

F

FACTORIES,
See Police Power.

FACTS,
administrative determination, 574, 576, 577.
attorneys must condense evidence, 550.
attorneys present to court, 549, 550.
balance of convenience, 539, 540.
classification cases, 538, 539.
commission findings as, 576, 577.
congressional committee hearings as source of, 577.
courts,
criticism of, due to failure to consider, 547.
evidence taken, 232, 551, 555, 556.
methods of deciding, 543-551.
must decide in constitutional cases, 538-543, 547.
danger of presenting irrelevant, 549, 550.
economists and determination of, 577.
emergency, question of, 350.
engineering evidence, 576.
judicial notice,
character of, 543, 544.
limitation of, 547, 548.
use of in constitutional cases, 544-546.
jury can not decide constitutional, 548.
labor legislation, 539.
legislative determination of, 553, 559, 563-568.
medical evidence of, 576.
minimum wage opinion flouted, 551.
municipal council to determine, 563, 564.
penologists as source of, 577.
police power cases, 539.
precedent of, not binding, 542, 545.
public opinion as evidence of, 582-588.
rate fixing cases, 232, 554.
scientific evidence, 576.
sociologists as source of, 577.
stare decisis, 542, 545.
state courts determine, 574, 578, 579.
statistical evidence of, 576.

[*References are to Pages.*]

FACTS—Continued.
technical character of, in social legislation, 540.
trading stamp cases, 554.
transcript fails to include constitutional, 548.

FAIRS,
taxation for, 506.

FALLBROOK IRRIGATION CASE,
Choate's argument, 440.
decision of lower courts, 462, 463.
legislative determination of facts, 568.
local conditions peculiar, 571, 572.
public opinion recognized in, 582.
reasoning of court in, 463, 464.

FARMERS,
See AGRICULTURE.
credit for, 527, 536.
exemption of, from Lever Act, 282.
purchase of seed for, if crop fails, 512.
taxation to aid, 506, 512.

FEDERAL COURTS,
See SUPREME COURT.
attitude of lower, toward due process and equality, 279-284.
revocation of charters for removing cases to, 388.

FEDERAL GOVERNMENT,
See CONGRESS; CONSTITUTION, UNITED STATES; INTERSTATE COMMERCE.
Fourteenth Amendment and supremacy of, 163, 298, 299.
police power, 302.
power over slavery, 327, 328.
strength of, under Constitution, 146.

FEDERALIST,
police power in, 301.
reasons for opposing Bill of Rights, 150-152.

FEES,
struggle over levy by governor in colonies, 119-122.

FENCES,
joint fence laws, 466, 467.
railroad to build on right of way, 425.

FERRIES,
eminent domain for, 471, 472.
monopoly, 332.
rate regulation, 472.

FIELD, S. J.,
applied due process to reserve power, 418-420.

FIFTH AMENDMENT,
adoption of, 159, 160.
broad character of provisions, 160, 161.
Congress,
consideration of, by, 154-156.
due process provision not discussed by, 156.
few acts of, held contrary to, 205.

[*References are to Pages.*]

FIFTH AMENDMENT—Continued.
Congress,
first act of, violating, 205.
power to tax under, 498.
contents of, 16, 17.
drafted by James Madison, 16, 154, 156.
due process of law in, 16, 17.
eminent domain provision of, 434.
influence of, 18, 19.
interpretation of, first in 1855, 205.
federal government limited by, 18.
general protection expected from, 159-161.
innovations in wording of, 17.
source of, 17.
state not limited by, 18, 176, 203.
text of, 16.

FINES,
immigrants illegally in United States, 236.
steamship companies bringing immigrants, 235, 236.
summary conviction for failure to pay, 197.

FIREMEN,
bonus to efficient, 517, 518.
exemption from jury service, 269.
pensions for, 508, 518.

FIRES,
destruction of property in, 227, 228, 308, 345.
taxation,
aid rebuilding after, 511, 526.
purchase fire fighting equipment, 525.

FIRST TEN AMENDMENTS,
See CONSTITUTION, UNITED STATES.

FISH,
eminent domain for right to, 524.
mill dams must provide way for, 427.
regulation of industry, 309.

FIVE KNIGHTS,
incident of, and petition of right, 6, 80.

FLOODS,
aid to sufferers from, 512.
protection from, public purpose, 459-460.

FLUMES,
eminent domain for logging, 477.

FOOD,
monopoly of meat sales, 331.
regulations for pure, 573.
summary destruction of unfit, 227, 282, 283.

FOREIGN CORPORATIONS,
See CORPORATIONS.
class legislation, 378.
constitutional rights protected, 388.
contracts voidable if charter is not filed, 410, 411.
power of state to exclude, 374-377.
resident priority in insolvency, 408.

[*References are to Pages.*]

FOREIGN LANGUAGES,
teaching of, in schools, 355.

FORESTS,
bounty for, 497.

FORFEITURES,
See CONFISCATION; PROPERTY.

FORMALITY,
See PROCEDURE.
due process requires more than, 593, 594.
notice and hearing not required, 233.
not necessary to validity, 224-226.

FOURTEENTH AMENDMENT,
adoption of, 18, 19, 161-167, 190, 204, 275.
arbitrary legislation prohibited, 206.
centralizing influence of, 163, 298, 299.
citizenship defined in, 19.
civil law in Louisiana, 447.
confusion in meaning of, 298.
Congress,
not limited by, 284, 287.
consideration of, by, 165.
contents of, 18, 19.
context of due process in, 19.
due process,
copied from the Fifth Amendment, 163.
extended to include negroes, 37.
due process included to give a broad protection, 163.
eminent domain provision of Fifth Amendment omitted, 19.
eminent domain restricted by, 296-298.
equality provision in, 271-275.
frequency of cases involving, 205, 206.
influence on state constitutions, 23, 176.
limitation on taxation, 498.
"Maxima Carta," 164.
object of, 18, 19, 161-167, 190, 204, 275.
police power, 334.
protection of, not limited to negroes, 276.
ratification of, 19, 164, 166.
supremacy of federal government, 163, 298, 299.
text of, 18.
unifying effect on constitutional law, 25.

FRANCHISES,
See CHARTERS; CORPORATIONS.
corporations forced to use, under reserve power, 370.
property right in, 420-423.
revocation of, under power to repeal charter, 390.
tangible property, 421.

FRANKLIN, BENJAMIN,
ignorance of contents of Magna Carta, 131.
summary indictment against, 108.

[*References are to Pages.*]

FRAUD,
See Police Power; Public Purpose.
Blue Sky laws, 408, 409.
decisions given by, not due process, 237.
public purpose of preventing, 540.
trading stamps, 554.

FREEDOM,
See Liberty.

FREEMAN,
due process extended to, 3, 36, 37.

FREE PASSES,
validity of, 427.

FREIGHT RAILROADS,
See Railroads.

FREUND, ERNST,
basic law of governmental power, 190.
development of idea of equality, 256.
originality of, 179.
scope of due process as police power limitation, 188.

FUNDAMENTAL LAW,
See Constitution.

FUTURES,
grain sales on, 572.
stock sales on, 564, 572.

G

GAMBLING,
prevention of, public purpose, 564.
summary collection of fines on, 241.

GAME,
hunting licenses discriminations, 282.
hunting regulations, 282, 309.

GARBAGE,
eminent domain for disposal site, 529.
monopoly for removal of, 331, 332.

G. A. R. POST,
taxation for, 506.

GAS,
municipal monopoly of, 331, 332.
public ownership of, 389.
rate regulation, 542, 549, 550.
regulation of natural, 570.

GENERALITY,
element of due process of law, 144, 159, 170, 174, 178, 185, 191, 202, 591-593.

GENERAL WELFARE,
See Public Purpose.

GIFT ENTERPRISES,
See Lotteries; Trading Stamps.

[*References are to Pages.*]

GIFTS,
public to individuals violates due process, 115, 116.
GLEBE LANDS,
Virginia acts confiscating, 196.
GOVERNMENT,
distinctive features of functions of departments, 600, 601.
expansion of activities of federal, 246.
inexact science of, 587.
object of, and due process, 597.
powers of, still unlimited by due process, 595, 596.
summary collection of money due, 204.
support of, a public purpose, 379.
GOVERNMENT, DEPARTMENTS OF,
See Administrative Officers.
GOVERNOR, COLONIAL,
instructions of, 97, 120.
powers of, 97, 119-122.
GRADE CROSSINGS,
abolition of, 403, 404.
common law rule on, 402.
eminent domain for, 475.
maintenance of, 401, 402.
protection of, 404, 405.
regulations of, 430, 431.
GRAIN,
future trading in, 572.
public weighing of, 333.
GRAIN ELEVATORS,
See Elevators, Grain.
GRAND JURY,
indictment by,
coke on, 77.
in colonies, 123, 176, 177.
in England, 74, 76, 77, 107.
unnecessary, 246, 247, 290.
GRANGER MOVEMENT,
influence of, 333, 339.
GRATUITIES,
See Public Purpose; Taxation.
may be repealed without reserved power, 384.
public to individuals void, 115, 116.
GREAT ASSIZE,
relation to due process of law, 71.
GREENBACK MOVEMENT,
influence on legislation, 339.
GRIST MILLS,
See Mills.
GROCERIES,
eminent domain for use of, 496
sale of liquor in, 308.

[*References are to Pages.*]

GUARDIANSHIP,
procedure in cases involving, 210.
GUN POWDER,
power to regulate storage, 301, 302.

H

HABEAS CORPUS,
disallowance of act in Massachusetts, 97, 98.
fear that federal government would suspend it, 148, 151.
proceedings under, 211, 212.
HALF-BREEDS,
See INDIANS.
HAMILTON, ALEXANDER,
danger of federal Bill of Rights, 150.
preamble as general protection of private rights, 166.
Stamp Act, 132, 133.
value of precedents as protection of rights, 138, 139.
HARBOR,
power of masters, 306.
regulations of, 304, 306, 307, 313.
HEALTH,
compulsory vaccination, 555, 556.
drainage assumed to protect, 454-459.
hours of labor of women, 549.
judicial attitude toward, 546.
night work injurious to, 543,
oleomargarine and public, 552,
proceedings endangering individuals, 228.
public purpose, 453, 454, 457-459, 497, 512, 513, 528, 529, 546, 560, 584.
tuberculin test for milk, 553.
vaccination, 346-348, 555, 556, 583, 584.
workers, 560.
HEARING,
administrative as due process, 223, 228.
appellate court may give, 110.
contempt procedure, 226.
corporate charter revocations, 387.
criterion of due process, 208-240.
ex parte, 226.
failure to appear does not invalidate, 224.
formal statement as, 224.
informal, 222, 224-226.
injunction as opportunity, 224.
legislative committee can not give valid, 198.
necessity of,
after emergency abatement, 227.
assessment of costs or damages, 228.
colonial Massachusetts, 110.
impairing property rights, 217.
render judgment valid in civil cases, 111.
opportunity for, is all required, 224, 228.
rejection of proof in, 225, 226, 228.

[*References are to Pages.*]

HEARING—Continued.
suit to collect taxes as, 223.
summary abatement cases, 227.
taxation cases, 222, 223, 419.
tentative judgment without, 228.
witnesses need not be heard, 225, 228.
HENRY III,
desired to evade Magna Carta, 37, 38.
reissued Magna Carta, 4.
HIGHWAYS,
See ROADS; STREETS.
HOARDING,
prohibition of, 282.
HOLMES, O. W.,
legislative determination of facts, 564.
public opinion recognized by, 583, 586.
scope of police power, 586.
vaccination cases, 555.
HOSPITALS,
eminent domain for isolation, 513.
HOTELS,
class legislation, 553.
hours of women's labor in, 553, 567.
taxation to aid, 504.
tax exemption, 498.
HOURS OF LABOR,
See LABOR; POLICE POWER; WOMEN; WORKERS.
HOUSE OF CORRECTION,
taxation for, 506.
HOUSE OF REPRESENTATIVES,
See CONGRESS.
HOUSING,
judicial notice of shortage, 546.
profiteering in, 357.
rent laws, 355, 356.
shortage of, an emergency, 352.
HUGHES, C. E.,
public opinion, 586.
HUNTING,
licenses for, 282, 294.
regulation of, 282, 309.
HUSBAND AND WIFE,
rights of property acquired from, 264.

I

ICE CREAM,
regulation of purity of, 573.
ICE PLANTS,
municipal ownership of, 533-535.

[*References are to Pages.*]

ILLEGITIMACY,
See LEGITIMACY.

IMBECILES,
marriage of, prohibited, 570.

IMMIGRATION,
cause of development of due process, 338.
procedure denying admissions, 235.

IMMUNITIES,
See PRIVILEGES AND IMMUNITIES.

IMPAIRMENT OF OBLIGATION OF CONTRACT,
See OBLIGATION OF CONTRACT; RESERVE POWER.

IMPLIED LIMITATIONS,
on legislature, 198-200.
on taxation, 495.

IMPORTS,
power to regulate, 595.

IMPRISONMENT FOR DEBT,
due process in England, 75.
special act releasing, 258.

IMPROVEMENTS,
See ASSESSMENTS; PUBLIC IMPROVEMENTS.

INCIDENTAL ENTERPRISES,
municipal ownership of, 534, 535.

INDEFINITENESS,
civil laws, 357.
contrary to due process, 356, 357.

INDIANS,
California convention, 173.
classification of lands owned by half-breeds, 265.
classification of land suits regarding, 260.

INDICTMENT,
changes in form of, 247.
Coke on grand jury, 77.
grand jury, 76, 77, 246, 247.
information, 82, 176, 246, 290.
necessity for, 74, 82, 123.
regular,
required before trial in England, 74, 82.
Story said due process secured, 180.
Richard II, charged with evading necessity of, 74.
summary, 108, 109, 123.

INDIVIDUALS,
case of, not to determine validity of law, 551-554.
doles to indigent, 510.
public gifts to, 115, 116.

INDUSTRIAL COURT,
validity of act establishing, 351, 353, 546.

INDUSTRIAL REVOLUTION,
influence of, 167, 246, 338.

[*References are to Pages.*]

INDUSTRIES,
classification by number of employees, 551.
INEBRIATES,
See DRUNKARDS.
INFANTS,
care of, by state, 508.
class legislation, 260, 263.
delinquent confined without jury trial, 210.
half fare on railroads, 429.
inheritance of illegitimate, 264.
protected by due process, 263.
INFORMAL PROCEDURE,
See PROCEDURE, INFORMAL.
INFORMATION,
See INDICTMENT.
indictment by, 82, 176, 246, 290.
INHERITANCE,
arbitrary change of law of, 198.
class legislation regarding, 264.
expectancy rights in, 264, 265.
INITIATIVE AND REFERENDUM,
See REFERENDUM.
INJUNCTION,
assessments restrained if levied without notice, 222.
common law basis for power of courts, 243.
opportunity for, may give adequate hearing, 224.
validity of laws limiting, 288.
INNS,
See HOTELS.
INNS OF COURT,
conservative character of legal instruction in, 88.
influence on colonies, 87, 88.
INSANE,
tax for care of, 507.
INSOLVENCY,
See BANKRUPTCY; CORPORATIONS.
INSTITUTIONS,
tax to aid private, 507-509.
INSTRUMENT OF GOVERNMENT,
failure of, as a Constitution, 512.
INSURANCE,
compulsory automobile indemnity, 430.
deposit of securities by companies, 408.
discrimination among companies, 430.
exclusion of companies from state, 375.
mutualizing of companies, 369.
regulation of companies, 394, 430.
revocations of companys' charter, 386.
service of process on companies, 409, 410.
INSURANCE COMPANIES,
See CORPORATIONS; INSURANCE; RESERVE POWER.

[*References are to Pages.*]

INTEREST,
rate fixing for single bank, 272.

INTERNATIONAL LAW,
English courts will construe statutes to agree with, 70.

INTERPRETATION,
See CONSTRUCTION.

INTERPRETIVE STATUTES,
must not impair vested rights, 263.

INTERSTATE COMMERCE,
corporations not engaged in, may be excluded by state, 374.
due process, 205, 597.
harbor regulations, 304.
interruption of, may create emergency, 352.
police power of state, 338, 559.
rates of carriers must be reasonable, 230.
state police regulations, 338, 559.
states cannot tax, 381.
union station as burden on, 398.
wage regulation of railroad, 357-359.

INTERURBAN RAILWAYS,
See CARRIERS; RAILROADS; STREET RAILWAYS.

INTIMIDATION,
cannot be used to prevent appeals, 239.

INTOXICATING LIQUOR,
abatement,
equipment for making, 319, 320.
liquor, 316-320, 351, 355.
property where sold, 319, 320.
classification of, 325, 326.
common law regulations, 318.
destruction of, in case of riot, 351, 355.
facts involved in cases of, 542.
judicial notice of evils of, 544.
legislature can make a nuisance, 315-324.
malt liquors may be prohibited, 324, 578, 587.
medicinal properties of, 577, 578.
possession of medicinal liquor prohibited, 324.
procedure in cases involving, 217-219.
prohibition,
destruction of property by, 323.
validity of, 206, 320-323, 340, 542, 544, 577, 578.
war time, 353.
regulations of, 308, 314-326.
revocation of charter of beer company, 386.
sales of,
certain individuals, 326.
club rooms, 326.
dance halls, 326.
near universities, 393.
Sundays, 326.
state dispensary system, 525, 526.
summary destruction of, 316-320, 351, 355.

[*References are to Pages.*]

IOWA,
attitude of court toward railroad grants, 481-484.
Bill of Rights used as model in California, 173.
due process in convention of, 175, 176.

IRRIGATION,
assessments for, 461, 465, 569.
districts for, are public corporations, 578, 579.
eminent domain for, 528.
public purpose, 465-566.

J

JAMES I,
charter to London company, 8.
questioned validity of Dr. Bonham's Case, 51.

JAMESTOWN,
establishments of (1607), 8.

JEFFERSON, THOMAS,
Bill of Rights desired in Federal Constitution, 157.
ignored due process during Revolution, 139.

JEOPARDY, DOUBLE,
due process, 180, 290.

JIM CROW CARS,
validity of statutes, 582.

JOHN,
barons feared he would not keep Magna Carta, 37.
Magna Carta granted by, 2.
patent of, to barons, 3.

JOINT RECONSTRUCTION COMMITTEE,
See Reconstruction Committee.

JUDGES,
See Judiciary; State Courts; Supreme Court.

"JUDGMENT OF HIS PEERS,"
ambiguous character of phrase in Magna Carta, 31, 32.
attempt to discard in New York convention, 170.
canon of Conrad II, 1.
includes common people, 77.
non-technical use of phrase in Magna Carta, 34-36.

JUDGMENTS,
erroneous, 236.
finality of administrative, 238.
finality without a hearing, 228.
fraudulent, not due process, 237.
legislative, not due process according to Webster, 202.
partial, not due process, 237.
summary, on bonds upheld, 210.
tentative, may be made without hearing, 228.

JUDICIAL NOTICE,
barbers long hours, 545.
common law rules, 545.
decisions of courts, 543.

[*References are to Pages.*]

JUDICIAL NOTICE—Continued.
definitions of terms, 543.
density of population, 546, 547.
doubts resolved against, 544.
emergencies, 546, 547.
facts in labor legislation, 542, 543.
floods and public health, 459.
housing conditions, 352, 546.
intoxicating liquor evils, 544.
legislative determination of facts, 575.
licenses frequently used for regulation, 546.
limitations on doctrine of, 547, 548.
local conditions, 572.
location of cities, 543.
official acts, 543.
origin of, in common law, 543, 544.
presumption of constitutional validity, 587.
public opinion, 545, 583, 586.
saves time of court, 554.
social customs, 545.
tobacco not unhealthy, 546.
vaccination, 555, 556, 583, 584.
vagrancy an evil, 544.
validity of classification, 565.
vice evils, 545.
women's wages, 546.
world war conditions, 546.

JUDICIAL PROCESS,
due process, 214-216, 224-226, 236, 262.
equality, 261.
forms of, favored, 224-226, 232.
notice and hearing, 219.

JUDICIAL REVIEW,
act curbing unconstitutional, 239.
administrative determinations, 229-232.
colonial forerunners of, 91, 126, 128, 129.
England does not have, 590, 591.
exercised only in clear cases, 562.
few acts of Congress held contrary to due process, 205.
Madison favored, 155.
Mirror of Justices advocated, 43.
natural rights, in colonies, 129.
Otis advocated, in opposing the Writs of Assistance, 126.
statistical study needed, 344.
used only in cases of actual conflict, 271.

JUDICIARY,
abuses of, in colonial Massachusetts, 95.
administrative convenience, 553.
American, as non-political, 582.
appeal to, must be permitted on ground of constitutionality, 239.
assessments reviewed by, 444-449.
cautious in decisions, 502, 503.
class legislation, 258, 267.

[*References are to Pages.*]

JUDICIARY—Continued.
congress left interpretation of Fourteenth Amendment to, 165.
conservation of, 502, 503.
criticism of, 540, 547.
determines if emergency exists, 350.
distinctive function of, 600.
due process,
broadened by, 207, 432, 433.
developed with needs, 273.
not defined by, 192.
recognized as legislative limitation by, 192-207.
reluctance in applying, 502, 503, 592, 596, 602.
subconscious development of, 274.
technique of application, 207, 344, 547, 548.
duties of lower federal, 279.
eminent domain and due process, 472-474.
English,
bound by acts of Parliament, 53-56.
power under Coke, 48-50.
similar tendency to American in due process cases, 69, 70.
equality, 271, 277.
error by, and due process, 236.
exclusion and inclusion process, 359.
"ex post facto" expanded by, 166.
facts must be decided by, 538-541, 547, 548, 550, 551.
federal more liberal in interpreting due process than states, 176.
few acts of Congress contrary to due process, 205.
function in applying due process, 598-604.
indefinite constitutional doctrines evaded, 469.
injunctions, 288.
judicial notice taken of decisions of, 543.
laissez faire of, 340.
law kept flexible by, 348, 349.
leadership of, in developing constitutional doctrines, 191.
legal tender cases, 330.
legislative activity of, narrow, 602.
legislative divorce, 269.
legislative interference with procedure of, 268.
Madison favored review by, 155.
Magna Carta enforced in Middle Ages, 39-42.
methods of deciding facts, 543-551.
movement for recall, 582.
natural rights conserved by, 203.
obligation of contracts expanded by, 166.
police power, 344, 551.
political philosophy, 540, 541, 547, 571.
preamble not expanded by, 166.
presumption of validity, 587, 588.
principles developed by due process, 603, 604.
procedure before, necessary to due process, 214.
public purpose,
evasion of, 434, 500.
leniency in cases of, 459.
quasi-judicial functions of, 601, 602.

[*References are to Pages.*]

JUDICIARY—Continued.
rate fixing cases, 230, 232.
"Republican form of government" not expanded by, 166.
reserve power limited by, 392.
retroactive interpretation avoided, 196.
Smith (Tolmin) on, 68.
sources of information on facts, 548, 549.
special legislation, 258, 267.
specific provisions preferred to general, 435.
statutes upheld if possible, 562.
strain construction to avoid unconstitutionality, 196.
summary proceedings, 236.
taxation upheld if possible, 496.
technique of, in applying due process, 207, 344, 547, 548, 596-598.

JURISDICTION,
due process requires, 193, 596.
representation, 125.
validity of increasing justices', 197.

JURY SERVICE,
exclusion from, 213, 270.
exemptions from, 269, 270.

JURY TRIAL,
abolition of, 212, 213.
administration of estates without, 210.
admiralty proceedings do not require, 211, 212.
bankruptcy proceedings and trial by, 210-212.
bastardy proceedings, 210.
changes in, upheld, 213.
composition of, and due process, 213.
confiscation acts contrary to, 193.
constitutional facts not decided by, 548, 573.
contempt cases, 209.
court can take case from, 563.
courts martial, 211.
delinquent children,
confinement of, 210.
diseased persons,
confinement of, 209, 210.
due process,
colonies, 107, 108, 142.
commentators, 180.
constitutional conventions, 170, 175.
English view, 73, 76, 79.
framers of Fourteenth Amendment, 164.
Magna Carta, 139.
Penn, 107, 108.
Pierce, 144.
Pomeroy, 181, 183.
requirement of trial by, 79, 107, 177, 180, 205, 208-213.
eminent domain cases, 211, 212.
facts on constitutionality not decided by, 548, 573.
Federal Constitution, 144, 147, 151.
guardianship cases do not require, 210.
habeas corpus, 211, 212.

[*References are to Pages.*]

JURY TRIAL—Continued.
inebriates, confinement without, 210.
intimidation of, and due process, 557, 558.
judgment on bonds, 210.
Magna Carta, 134.
liquor cases, 315, 316.
necessity of, in colonies, 112.
paupers, confinement without, 210.
petit cases, 209-212.
powers of, and due process, 213.
probate cases, 210, 212.
right to serve on, 270.
size of may be decreased, 213.
state constitutions, 210, 211.
struck, 213, 248.
taxation cases, 224.

JUS GENTIUM,
as source of doctrine of natural rights, 47.

JUSTICE,
Adams, J., on importance of, 181.
common, 179, 181.
Dartmouth College Case, 361, 362.
distributive, 192.
equality, 260.
laws must secure, 272.
natural, 195, 200, 214, 248, 387, 409.
police power and Plato's concept, 300.
sale of, prohibited by due process, 111.
statutes interpreted to give, 196.

JUSTICES OF PEACE,
validity of act increasing jurisdiction, 197.

JUSTINIAN,
quoted by Edward I in calling Model Parliament, 38.

K

KANSAS,
court of industrial relations, 351, 353.

KENT, JAMES,
equality and due process, 182.
influence on courts, 182.

KING,
due process as limitation on, 39-41, 194.
grant of monopoly of issuing judicial writs illegal, 76.
legislative and executive power confused, 42.
opposed enactments of colonial Bill of Rights, 98-101.
personal order of, as due process, 42, 72.
Petition of Right restricted, 80.

KNIGHTS OF LABOR,
growth of, 339.

[*References are to Pages.*]

L

LABOR,
See also WORKERS; WORKMEN'S COMPENSATION LAWS.
Adamson Law, 357-359.
assessments to be paid in, 458.
corporation relations with, 411-415.
discharge of union men, 347.
employment agency regulation, 560, 561.
hours of,
bakeries, 559.
regulations on, 342, 569.
women's, 268, 549, 553, 567, 570, 580.
industrial courts, 351, 353.
judicial notice of long hours of, 545.
legislation for,
technical character of facts in, 539, 540.
minimum wage law, 354, 571.
mining, 550, 570.
night work of women prohibited, 542, 576.
railroad wages, 357-359.
screening acts in coal mines, 570.
tenement regulations, 546.
wage payment laws, 357-359, 412-415, 425, 432, 571.
women's,
judicial notice of conditions, 546.
hours of, regulated, 268, 549, 553, 567, 570, 580.
night work prohibited, 542, 576.
workmen's compensation laws, 558, 559, 569, 570.

LABORERS,
exemption from jury service, 270.

LABOR UNIONS,
anti-injunction laws, 288.
exemption of, from monopoly acts, 566.

LAISSEZ FAIRE,
judicial attitude of, 504.

LAKES,
submerged land not alienable, 487.

LAND,
act requiring cultivation, 265.
clearing by special assessments, 466, 467.
disappearance of free, 246.

LAND GRANTS,
reversion of, to state, 122.

LANDLORDS,
profiteering, 283.
rate regulation of, 542.

LAND TITLES,
burnt record acts, 345.
class legislation, 265, 266.
curative statutes, 199, 204.
guardianship sale, 263.

[*References are to Pages.*]

LAND TITLES—Continued.
Indian, 265.
registration of, 111, 112, 266.
reversion of, to state, 122, 233.
squatters' laws, 268.
transferring, by statute, 219.

LANGUAGE,
teaching of foreign, 351.

LAUNDRIES,
See Police Power.
regulations of, 563.

LAW,
Blackstone,
definition of, 61.
influence on, 90.
colonial,
characteristics of, 87-90, 95.
sources of, 87-89.
subordinate to English, 90.
courts try to keep flexible, 348, 349.
customs, 582.
definition of, 258.
ignorance of, in colonies, 95.
permanence necessary, 61, 64.
science of developing, 543.

LAW AND FACTS,
See Facts.

LAW ENFORCEMENT,
repayment of officer for losses due to, 514, 517.

LAW OF NATIONS,
as source of natural right, 47.

LAW OF NATURE,
See Natural Law.

LAW OF THE LAND,
ambiguous character of phrase in Magna Carta, 31, 32.
civil law not, 193.
Coke identified with due process, 77.
colonists thought of common law as, 135, 142.
common law as, 75, 135, 142, 241-245.
due process related to, 5, 57, 77, 175, 176, 272.
English thought of common law as, 75.
influence of, 95, 132, 134.
legislative enactment is not, 192-207, 318.
Magna Carta use of, 23, 31, 32, 34-36.
natural justice, 200.
Petition of Right, 80.
Stamp Act contrary to, 134.
trial by oath or battle, 76.

LAWYERS,
See Attorneys at Law.

[*References are to Pages.*]

LEGALITY,
due process, 83-85, 589, 604.
Magna Carta required, 33-36, 74.

LEGAL TENDER CASES,
change of judicial attitude in, 330.
Dred Scott opinion reflected in, 337.
issue in, 329.

LEGAL WRITERS,
See COMMENTATORS; COOLEY, T. M.; COKE, SIR EDWARD; BLACKSTONE, W.; FREUND, E., ETC.

LEGES HENRICI (c. 1118),
due process of law in, 2.

LEGISLATURE
agreement of the people to limit, 52.
assessments levied by, 444-449.
benefits determined by, 469.
charitable aid determined by, 510.
charter revocation by, 360-433.
colonies,
Bill of Rights as limits on, 94-101, 105, 140.
parliamentary supremacy opposed, 127-136.
conflicting interests adjusted by, 455, 464, 465.
Cooley declared due process limited, 184.
debatable questions determined by, 574.
delegation of power, 58, 86, 339-341.
due process as limitation on, 96-101, 107, 113, 169-172, 174, 177, 183, 192-207, 219, 241, 242, 590, 591.
economic conditions, 338, 339.
emergency power of, 350, 356.
enumerated powers of, 439, 440.
executive confused with, in mediæval England, 42.
facts decided by, 563, 578, 587.
federal Bill of Rights to limit, 148, 149, 154.
Fourteenth Amendment limitation on state, 205-207.
function of, 600.
Hume on supremacy of, 129, 130.
implied limitations on, 438, 439.
investigation powers of, 569.
Jefferson demanded Bill of Rights to curb, 157.
judgment by, not due process, 197.
judiciary and functions of, 599-604.
law of the land not made by, 192-207, 318.
local conditions, presumed familiar to, 553, 563-575.
Locke on limits of power of, 57, 58, 85.
license fees on foreign corporations determined by, 377.
Madison claimed Bill of Rights would restrict, 155.
Magna Carta as limitation, 44, 94.
means not entirely left to, 527.
moral obligations determined by, 515.
Paschal on due process as limit on, 183.
Penn declared due process limited, 107.
Pomeroy declared due process limited, 183.

[*References are to Pages.*]

LEGISLATURE—Continued.
police power determined by, 559.
procedure in, as due process, 192-207, 216, 219.
public purpose determined by, 463.
public utilities created by, 492-504.
reasonableness of rates determined by, 334.
reserve power, 360-433.
Supreme Court on due process as limitation on, 204.
suspension of the law by, 270.
taxation,
due process, 438.
special provisions limiting, 436, 437.
Vatel on supremacy of, 129, 130.

LEGITIMACY,
inheritance laws, 264.
jury trial unnecessary in proceedings regarding, 210.
statutes on, 265.

LEVEES,
assessments for, 459, 460.
civil law, in Louisiana, 460.

LEVELLERS,
exalted natural law, 56, 57.

LEVER ACT,
validity of, 282, 356, 357.

LEX REGIA,
enactment of, 46.

LIABILITY,
carriers, 472.
personal for tax burden, 443.
public utilities, 470.

LIBERTY,
civil as basis of government, 256.
colonists looked upon Magna Carta as stating principles of, 132.
due process, 84, 248, 590.
religious and Sunday laws, 310, 311.
speech, in war time, 346.

LIBRARIES,
books on law and political science in colonial, 88, 89.
eminent domain for, 506.
taxation for, 506.

LICENSES,
bakery, 307, 308.
brokers, stock, 280.
corporation, 378.
dairy, 400.
discriminatory, 281, 282, 380-382, 423.
English use of, 49.
foreign corporations, 375, 377.
forfeiture procedure, 233, 234.
grazing on public land, 282.
hunting, 282, 294,

[*References are to Pages,*]

LICENSES—Continued.
judicial notice of purpose of, 546.
lawyers, 114.
police power, 546.
pool halls, 234.
residence discriminations, 281, *282.*
revocation of, without notice and hearing, *233,* 234.
saloons, 234.
trading stamps, *279.*
warehouse, 333.

"LIFE, LIBERTY AND PROPERTY,"
origin of phrase, 17.

LIGHTHOUSE,
eminent domain for, 505.

LIGHTING PLANTS,
municipal ownership of, 529, 530.

LIQUOR,
See Intoxicating Liquor.

LIVE STOCK,
See Cattle.

LOCAL CONDITIONS,
judicial notice of, *572.*
legislature presumed to know, 553, 563-575.
state courts may determine, 533.

LOCAL GOVERNMENT,
See Municipalities.

LOCAL IMPROVEMENTS,
See Assessments; Public Improvements.

LOCKE, JOHN,
influence of, 85, 90, 128, 136, 180.
legislature should be limited, 57, 58, 130.
natural rights, ideas of, 17.
parliamentary supremacy, 57, 58, 130.
philosophy of due process, 85.

LOCKS,
right to operate as property, *422.*

LOGGING,
eminent domain for flumes, 477, 503.
taxation to aid, 497.

LONDON COMPANY (1606),
due process in charter of, 8.

LOTTERY,
prohibition of, a public purpose, 564.
summary collection of fine on, 241.

LOUISIANA,
civil law in, 460.

LUMBERING,
eminent domain for flumes, 477, 503.
taxation to aid, 497.

[*References are to Pages.*]

M

MADISON, JAMES,
debates in Federal Convention of 1787, 145.
Fifth Amendment drafted by, 16, 17, 156.
first ten amendments demanded by, 155.
floor leader in first Congress, 154.
judicial enforcement of Bill of Rights favored, 155.
obligations of contract clause, 363.
unwieldy House of Representatives predicted by, 155.
MAGNA CARTA,
barons' demand for, 2.
Coke,
confirmations of, stressed, 64.
influenced interpretation of, 78.
interpretation of, 76-78.
common law, 113, 131, 132, 137.
"common right" protected by, 199.
colonists views of,
arguments based on, 12, 96, 119-122, 130-132, 141.
cited frequently, 93.
complaint of violations, 96.
contents little known, 92.
copies available after 1687, 92, 108.
English Constitution summarized by, 128, 129.
founded on common law, 137.
fundamental law, 91-105.
generic use of term, 91.
governors limited by, 119-122.
ignorance of contents, 131, 137.
Massachusetts Body of Liberties, 93, 94, 97.
parliament limited by, 126.
part of colonial law, 9.
protections claimed, 9, 141.
revolution, 139.
Stamp Act contrary to, 126, 131, 132.
taxation without representation prohibited by, 130.
unalterable, 128, 129.
used as seal, 137.
confirmations of, 4, 37.
criterion of reasonableness, 137.
Court of Star Chamber violated, 7.
development of meaning of, 589, 590.
enforcement provisions of, 37-39.
England's fundamental law, 30, 45, 66, 67, 129.
events leading to, 30, 35.
excommunications of violators, 38, 39.
freemen included in protection of, 3.
fundamental character of, 45, 48, 49, 63, 64, 247.
generic use of term, 91.
influence of,
colonies, 87-124.
England, 30-45.
state constitutions, 21-24.

[*References are to Pages.*]

MAGNA CARTA—Continued.
interpretation,
differences of, 32.
difficulties of, 30-32.
law of the land,
arbitrary action restrained by, 33.
context of, 31.
criterion of, 194.
execution without trial prevented by, 33.
law of time enacted by, 182.
legality of governmental actions demanded, 33-36, 74.
meaning, 32-36.
principal clause in, 31, 132.
wording of, 3.
Maryland Declaration of Rights (1777) copied, 15.
New York constitutional convention, 171.
norm for statutes, 44.
numbering of sections of, 3.
parliament limited by, 52, 53, 61-63, 126.
Penn claimed privileges of, in colonies, 100, 101.
Petition of Right interpreted, 6, 81.
police power, in colonial Virginia, 114.
procedure described by the "law of the land," 34-36, 73, 113, 131, 132, 137.
published in colonies first by Penn, 12, 108.
reissues of, 4, 36, 37.
Richard II deposed for violating, 40.
scope of protections extended, 36, 37.
state constitutions, 21-24.
taxation, 117-119.
trial by jury not guaranteed by, 73.
"vel" in, 32-34.
violations of, in England, 38, 42.
wording of c. 39 (29), 3.

MAILS,
congressional power over, 293, 294.

MALT LIQUORS,
prohibition of, 324, 578, 587.

MANDAMUS,
See PROCEDURE.

MANUFACTURING,
donations to, by municipalities, 493-497.
loans to, by municipalities, 492, 493.
public utilities do not include, 492-497.
taxation to aid, 492-497.
tax exemption, 498.

MARKETING ORGANIZATION,
state establishment of, 535.

MARRIAGE,
imbeciles prohibited, 570.
rights of parties to, 264.

MARSH,
drainage of, 454-459.

[*References are to Pages.*]

MARSHALL, JOHN,
first to use "police power," 301.
power of taxation, 482.

MARTIAL, COURTS,
See Courts Martial.

MARYLAND,
colonial governor attempted to levy fees in, 122.
due process,
Declaration of Rights (1776), 15.
enacted by colonial assembly, 101-103.
limitation to whites in, 37, 174, 175.

MASON, GEORGE,
author of Virginia Declaration of Rights (1776), 14, 17, 146.
Bill of Rights a common law protection, 147.
governmental power feared, 146.
led movement for Bill of Rights in Constitution, 146.

MASSACHUSETTS,
Acts of Privileges,
adoption of, 97.
disallowance of, 98.
Body of Liberties,
adoption of, 93-95.
Winthrop's explanation of, 115.
wording of due process in, 9.
charter of William and Mary, 119.
Constitution,
due process compared with law of the land, 175.
due process provision in, 21.
repeal of due process attempted, 176.
Magna Carta in, 94, 95, 137.
public support of religion in colonial, 115-117.

MASTER AND SERVANT,
See Labor; Workers; Workmen's Compensation.

MASTER IN CHANCERY,
facts determined by, 549, 550.

MAYOR,
permission to use streets granted by, 552.

MEDICAL SOCIETIES,
duties of, extended under reserve power, 373.

MEDICAL TESTIMONY,
evidence by, 556.
importance of, 576.

MEDICAL TREATMENT,
taxation for, 513.

MIDDLE TEMPLARS,
influence of, in colonies, 88.

MILEAGE BOOKS,
See Script Books.

MILITARY CAMPS,
police regulations around, 346.

[*References are to Pages.*]

MILITARY OPERATION,
confiscation of property for, 345.

MILITARY POWER,
due process not applied to, 595.

MILITARY TRIBUNALS,
proceedings in, 211.

MILITIA,
exemption from jury service of members, 270.
pension for injured members, 519, 520.
reduced transportation rates for, 427.

MILK,
filled, 574.
regulation of sale of, 400.
tuberculin test for, 553.

MILLS,
dams for, 427.
economic importance of, 490, 491.
eminent domain for, 472, 489, 490, 496.
public utilities, 499.
rate regulation, 472, 490.
rates to be regulated, 490.
relation of acts for, to water power cases, 499.
state ownership of, 535.

MINES,
classification of, 551, 558, 559, 565.
coal,
cave-in act, 351,
emergencies, 354.
screening acts in, 425, 570.
drains for benefit of single, 457.
eminent domain for, 478, 503.
hours of labor in, 569.
labor regulations for, 550.
screening law in, 425, 570.

MINIMUM WAGE CASE,
due process as limitation on Congress in, 205.
emergency, 354.
scientific facts flouted, 551, 556.

MINIMUM WAGE LAW,
railroad workers, 357.
state regulations of, 354.
validity of, 414, 571.

MINORITY,
Bill of Rights demanded to protect, 149, 154.
charter alteration to protect, 369.
cumulative voting in corporations, 371.

MINORS,
See INFANTS.

MIRROR OF JUSTICES,
advocated judicial review, 43, 44.
due process includes idea of right and justice, 75.
Grand Jury secured due process, 74.

[*References are to Pages.*]

MISMANAGEMENT,
charter revoked for, 386.

MODEL PARLIAMENT,
called by Edward I, 38.

MONASTERIES,
Sir Thomas More declared dissolution illegal, 75.

MONEY,
power of Congress over, 329.

MONOPOLIES,
collection of dead animals, 332.
contracts of, made voidable, 416.
ferry, 332.
garbage removal, 331, 332.
gas supply, 331, 332.
grant of, by state, 267.
meat sales, 331.
plumbing, 332.
railroads, 332.
regulations of, 415-417, 563, 566, 572.
school books, 331.
slaughter houses, 330-332.
state constitutional provisions against, 331.
state printing, 332.
street lighting, 332.
telephone, 331.
toll bridges, 331-332.
water supply, 331, 332.
wharves, 332.

MORAL OBLIGATION,
damages from ultra vires act, 514.
definition of, 513.
legislative determination of, 515.
New York rule on, 516, 517.
soldiers' bonus sustainable as, 521, 523.
sugar bounty, 498.
taxation to pay, 513-523.

MORALS,
See GAMBLING.
protection of, public purpose, 572.
women's work in saloons, 268.

MORE, SIR THOMAS,
dissolution of monasteries and due process, 75.
parliamentary powers limited, 48.

MORTGAGES,
foreclosure of, against service men, 348.
taxation of, 419.

MOTHERS,
pensions for, 497.

MUNICIPAL COUNCIL,
to judge local conditions, 563.

[*References are to Pages.*]

MUNICIPALITIES,
Magna Carta limited, in England, 49.
monopolies granted by, 331, 332.
statutory authority necessary, 506.

MUNICIPAL TRADING,
amusement parks, 534.
coal, 574.
coaling of ships, 533.
incidental enterprises, 534, 535.
lighting plants, 529, 530.
oiling station, 496.
play grounds, 506, 524.
plumbing, 534.
real estate, 459, 526, 527.
street railways, 531.
theatre, 534.
validity of, 528-535.

MURRAY CASE,
basis of decision, 242, 243.
criticism of, 243.
development of due process based on, 244.
discussed, 242-245.
importance of, 244.
not overruled, 247.

N

NATURAL LAW,
class legislation, 267.
common law, 59.
Dartmouth College Case did not reply upon, 361, 362.
due process, 195, 272, 590.
English constitution, 47.
equality demanded by, 257, 258.
law of God made part of law of colonial Connecticut, 96.
legislature limited by, 60, 438.
levellers exalted, 56.
notice and hearing guaranteed by, 2.
statutes must conform with, 47, 57, 58, 60.
worship of, declined, 244.

NATURAL RIGHTS,
See NATURAL LAW.
American conception, 198-202.
courts try to conserve, 203.
statutes contrary to, held void, 202.

NAVIGATION,
eminent domain to improve, 477.
harbor project of municipality, 526.
police regulations, 304, 306, 307.

NEAR BEER,
See INTOXICATING LIQUORS.

NECESSITY,
See EMERGENCY; PUBLIC PURPOSE.

[*References are to Pages.*]

NEGROES,
classification of,
punishment, 258.
schools, 276.
zoning, 560.
due process, in Maryland, 174, 175.
equality provision, 275.
Fourteenth Amendment, 161, 162, 295.
freedom by owner's will, 263.
Jim Crow car law, 582.
jury service exclusion, 270.
liquor sales prohibited to, 326.
railroad accommodations regulated, 582.
schools of, regulated under reserve power, 369.
zoning ordinance, 560.

NEW JERSEY,
assembly demanded right to levy taxes, 119-121.
colonial due process provisions, 11, 12.

NEW YORK,
colonial attempts to enact Charter of Liberties, 98, 118.
constitutional influence on other states, 22, 23, 173.
due process provision in (1777), 11, 15, 169-171.

NINTH AMENDMENT,
purpose of, 160.

NOBILITY,
prohibition of titles of, 256.

NON-PARTISAN LEAGUE,
legislation of, 535-537, 574.

NORTH CAROLINA,
colonial assembly enacted due process,
provision for, 104.
deed of grant,
called a Magna Carta, 92.
due process as a legislative limitation in, 192-194.
governor's power to fix fees in, 122.

NORTHWEST ORDINANCE,
due process incorporated in, 143.
statutory construction rules not observed, 144.

NOTICE,
adequate, what constitutes, 122, 251.
assessments require individual, 221.
taxation cases, 220-222.

NOTICE AND HEARING,
See PROCEDURE.
administrative cases, 220-226.
aliens,
deportation, 235.
exclusion, 235.
fines for those illegally in United States, 236.
assessment cases, 463.
bond forfeitures, 267.

[*References are to Pages.*]

NOTICE AND HEARING—Continued.
cases where not required, 232-236.
colonists thought due process required, 110, 123, 141.
common law, 51, 208.
contempt cases, 209.
criterion of due process, 208-240.
English courts will require, even if not required by statute, 69.
elasticity given due process by, 219.
element of due process, 197, 240.
informal as due process, 224, 226.
injunction opportunity as adequate, 224.
judicial forms favored, 232.
"judicial process," 219.
land titles,
divestment of, 111.
reversion to state, 233.
licenses revoked without, 233.
liquor cases, 217, 316.
ministerial decisions do not need, 233.
natural right guarantees, 216.
officer, removal of, 236.
proprietary control of state, 234.
quasi-judicial determinations, 226.
quasi-legislative determinations, 229.
steamship companies fined without, 235, 236.
subsequent suit not enough, 111.
tax collection by summary procedure, 193, 419, 420.

NOVEL DISSEISIN,
relation to due process of law, 71.

NUISANCES,
abatement of,
assessment for, 458.
public purpose, 526.
bowling alleys, 571.
judicial notice of common law rule, 545.
legislative power to declare, 314, 315, 319.
liquor equipment, 319.
police power and destruction of, 347.
public improvements to prevent, 453.

O

OATHS,
affirmation not due process in colonial Maryland, 106.
dueling, 311.
due process requires more than, 258.
requirement before suit, 264.

OBLIGATION OF CONTRACTS,
See CONTRACTS.
courts expanded meaning of, 166.
cumulative voting laws, 370.
Dartmouth College Case, 361, 362.
due process related to, 329.

[*References are to Pages.*]

OBLIGATION OF CONTRACTS—Continued.
land title curative acts not contrary to, 204.
license fee discriminations, 380.
police power, conflicts with, 338, 386.

OCCUPATION TAXES,
See LICENSES.

OFFICERS,
class legislation depriving of office, 262.
free transportation for, 396, 425, 427.
judicial notice of acts of, 543.
legislative acts ousting, 262.
payments to,
equipment purchased for government, 513.
excess services, 514.
losses made good, 517.
stolen money reimbursement, 515.
removal of, 234, 236, 262.
salaries of de facto, 515.
summary removal of, 236.
taxation to pay, 505.
test oaths for, 312.
vested right in office, 236, 262.

OIL,
regulating of wasting of, 570.

OILING STATION,
eminent domain for, 496.

OIL REFINERY,
state ownership of, 535.

OIL TANKS,
regulation of, 554.

OLEOMARGARINE,
regulation of, 552.

OPINION,
See PUBLIC OPINION.

OPIUM,
prohibition of, 323.

ORDINANCES,
police regulations, 306, 307.
reasonableness required, 206.

OTIS, JAMES,
jury trial and due process, 134.
popularity of, 126, 127.
views changed, 127.
writs of assistance argument, 125-127.

OUTLAWRY,
procedure required for, in England, 41.

OYSTER BEDS,
eminent domain for, 524.

[*References are to Pages.*]

P

PAINE, THOMAS,
due process provision, 139.
police power, 301.

PAPER MONEY,
colonial acts for, 112, 113, 122.
legal tender cases, 329, 330.

PARKS,
eminent domain for, 524.
superintendents residents, 524.
taxation for, 524.

PARLIAMENT,
arrested by order of, 54.
bills of attainder passed by, 54.
Coke on limited powers of, 49.
colonists struggle over supremacy of, 125, 127, 129, 136.
due process as limitation on, 113, 115.
English Constitution limited, 127, 138.
evolution of, 5, 6, 46.
Hume on supremacy of, 129, 130.
judiciary bound by acts of, 53-56.
Magna Carta as limitation on, 44, 53-56, 125.
Shebbeare declared it limited, 61, 62.
supremacy of, 63, 66-68, 129, 130, 136.

PARLIAMENT OF OXFORD,
called because of violations of Magna Carta, 38.

PASSENGER RAILROADS,
See Railroads.

PASSES,
free, 396, 425, 427.

PATERNALISM,
due process, 510.

PATRIOTISM,
public purpose to foster, 520-523.

PAUPERS,
doles to, 509, 510.
jury trial not necessary to confine, 210.
preventive relief of, 512.
tax for care of, 507-512.

PEACE,
public purpose to secure, 473, 560.

PENALTIES,
electrocution for murder, 246.
classification of, 273.
corporal punishment as, 258.
taxation, 241.

PENNSYLVANIA,
due process in colonial, 99-101, 121.

[*References are to Pages.*]

PENN, WILLIAM,
Bill of Rights advocated for Pennsylvania, 100.
due process,
interpretation of, 107, 108.
reasons for demanding, 105.
governor's power over fees, 121.
Magna Carta,
first published in colonies by, 12, 92, 108.
privileges claimed for colonies, 100, 101.

PENOLOGISTS,
facts presented by, accepted by court, 577.

PENSIONS,
civil war veterans, 521.
firemen's, 508.
militiamen, 519, 520.
public employees, dependents of, 518.
retirement, 519.
teachers, 519.

PERSONS,
emphasis shifted from rights of, to property rights, 185.
corporations as, 419.

PETIT CASES,
jury trial unnecessary in, 209-211.

PETITION OF RIGHT,
effects of, 81.
events leading to, 80.
enactment of, 80, 81.
indictment before trial demanded, 74.
Magna Carta,
interpreted by, 81.
quoted in, 6, 7.
provisions of, 6, 7.

PHILOSOPHY,
changing character of, 584.
courts influenced by, 540, 541, 547, 571, 603.
due process,
American political, 273, 433.
John Locke stated, 85.
pragmatic influence, 246.
vested rights doctrine and due process, 202.

PHYSICIANS,
licenses required in England, 49.

PIPE LINES,
eminent domain for, 476.

PLAYGROUNDS,
eminent domain for, 506, 524.
taxation for, 524.

PLEASURE,
public purpose to promote, 478.

PLEBISCITE,
See REFERENDUM.

[*References are to Pages.*]

PLUMBING,
monopoly of, 332.
municipal sale of, 534.

POLICE POWER,
assessments, 458.
bakeries, 539, 540, 559.
balance of convenience, 349, 350
banks, 393, 394.
barber shops, 555.
billboards, 573.
blue sky laws, 408, 409.
bowling alleys, 315, 571.
building construction, 565.
burden of proof on those attacking, 557.
cattle guards, 313.
cemeteries, 307.
charter revocation, 369, 374, 386, 393-433.
class legislation, 317, 578.
coal screening acts, 414.
commentators on relation of due process to, 187.
commerce clause, 338.
common law, 245, 313, 314, 316.
concepts related to, 305.
conservation, 464, 570.
convenience as object, 306.
Cooley on due process as limitation on, 185.
definition of, 302-306, 335.
destruction of property under, 347.
duels, 311.
due process,
colonies, 123.
development of, 255, 306-313, 332-339, 542.
legitimate exercise of, 336.
procedural limitations, 306-313.
state conventions on, 174, 175, 177.
substantive limitations, 314-328.
economic conditions and extension of, 338.
emergency, 227, 228, 308, 344-360.
eminent domain, 313, 447.
employment agencies, 560, 561.
ex post facto, limitations on, 314.
extortion as object, 283, 331.
facts, determination in cases under, 539, 542, 576-588.
fish industry, 309.
fires, destruction of buildings in, 308, 345.
filled milk, 574.
food, summary destruction of unfit, 227.
Fourteenth Amendment, 334.
fraud as object of, 279, 408-411, 540.
Freund on scope of due process as limitation on, 188.
future trading,
grain, 572.
stocks, 564, 572.
grade crossing, 401-405, 430.

[*References are to Pages.*]

POLICE POWER—Continued.
grain weighing by public, 333.
gunpowder storage, 301, 302.
harbor regulations, 307.
health as object of, 304, 307, 330-332, 346, 347.
hoarding of necessities, 282.
hunting regulations, 282, 309.
ice cream, 573.
industrial courts, 351, 353.
injunction laws, 288.
intoxicating liquors, see Intoxicating Liquors.
insurance companies, 394.
Jim Crow car law, 582.
labor regulations, see Labor.
land cultivation, 265.
laundries, 563.
lawyers, regulation of, 114, 115.
Legal Tender Cases, 330.
legislation for, often unworkable, 339.
legislature first judge of validity, 559.
limitations on, 305-309.
liquors, see Intoxicating Liquors.
lotteries, 241, 564.
marriage of imbeciles, 570.
mines,
cave-in act for coal, 351.
labor regulations, 425, 469, 470, 550.
regulations of coal, 565.
minimum wage law, 354, 571.
monopoly regulation, 267, 331, 415-417, 563, 566, 572.
morals, 314-328.
natural resources, conservation of, 464, 570.
nuisance abated under, 347.
object, one valid is enough, 557.
obligation of contract, 338, 386.
oil tank regulation, 554.
oleomargarine regulation, 552.
origin of, 300-302.
passes to public officials over railroads, 396, 425, 427.
pool halls, 315, 553, 572.
procedure in cases of, 226-232.
profiteering, 282-284, 352.
prohibition of liquors, see Intoxicating Liquors.
property values, protection of, as object, 560.
public health as object of, 304, 307, 330-332, 336-346.
public necessity an element of, 349.
public opinion, 582-588.
public welfare, 393.
pure food regulations, 573.
railroad regulations, see Railroads; Street Railways.
rate regulation,
gas companies, 549, 550.
grain elevators, 333.
public utilities, 339.

[*References are to Pages.*]

POLICE POWER—Continued.
rate regulation,
railroads, 339, 341, 427, 431, 432.
reasonableness, 334, 342, 554.
rents, 283, 284, 355, 356, 542, 546, 547.
stock yards, 333.
validity of, 394-396.
warehouses, 333.
reasonableness, 336, 423, 424, 561, 570.
rents, regulation of, 283, 284, 355, 356, 542, 546, 547.
reserve power, 369, 374, 386, 393-433.
safety as object of, 301, 302, 304, 308, 345, 346, 400-406, 541.
schools, 351, 355, 575.
scope of, 304-306, 568-575, 586.
script book regulations, 432.
service letter law, 415, 586.
shipping regulations, 306, 307.
sidewalks around stations, 453.
sleeping cars, 578.
slaughter houses, 330-333.
slavery, 198, 308, 327, 328.
sovereignty, 302-304.
stare decisis in questions of, 542.
station facilities, 397-399.
store orders, 414.
streams, 406.
Sunday laws, 194, 309-311, 545.
Supreme Court slow to apply due process to, 329-343.
tallow works, 197.
taxation, 482, 483, 525, 536.
teaching foreign languages, 361.
tenements, 556.
test oaths, 311, 312.
trading stamps, 279, 554.
train service, 399.
transfers on street railways, 396.
tuberculin test for milk, 553.
universities, 262.
usury, 263, 272.
vaccination, compulsory, 346-348, 555, 556, 583.
war power, 313, 344.
women, see Labor, Women
workmen's compensation act, 415, 558, 559, 567.

POLICEMEN,
free transportation for, 427.

POLITICAL POWER,
due process not applied to, 595.

POLITICAL SCIENCE,
Cooley's influence on, 187.
not an exact science, 587.

POOL HALLS,
regulations of, 315 553, 572.

POOR,
See PAUPERS.

[*References are to Pages.*]

POPULATION,
classification of cities by, 551.
judicial notice of density, 546, 547.
POPULIST MOVEMENT,
influence on legislation, 339.
POST MASTERS,
exemptions from jury service, 270.
POST OFFICE,
eminent domain for, 505.
POWER LINE,
eminent domain for, 477.
POWER PLANT,
state ownership of, 529.
PREACHERS,
See CLERGYMEN.
PREAMBLE,
courts refused to expand in United States Constitution, 166.
domestic tranquility, 301.
Hamilton's interpretation of, in federal Constitution, 166.
PRECEDENTS,
colonists refused to argue revolution on basis of, 138.
facts not taken as, 542, 545.
Hamilton on value as protection of rights, 138, 139.
PREJUDICE,
will not vitiate trial if court has, 110.
PRESCRIPTION,
as test of valid procedure, 251.
PRESS,
lack of provision protecting freedom of, criticized in Constitution, 147, 151.
PRESUMPTION OF VALIDITY,
dangers in, 593.
judicial notice, 587.
relation to public opinion, 587.
statutes upheld if possible, 562, 566, 573, 574, 576.
PRINCIPLES,
balance of convenience and due process, 597.
colonists relied on due process, 133.
common law and public policy, 253.
Cooley first to state as basis of Constitutional Law, 184, 185.
development of, by courts, 603, 604.
eminent domain limited by fundamental, 473, 474.
jurisdiction as due process, 596.
law, not facts involved in, 542, 543.
legislature limited by inherent, 438.
police power and fundamental, 315.
public purpose and due process, 597.
relation of means to end and due process, 597.
transition periods obscure, 246.
Webster claimed due process looked to fundamental, 202.

[*References are to Pages.*]

PRINTING,
monopoly of state, 332.
PRIVATE DOCKS,
eminent domain for, 477.
PRIVATE INSTITUTIONS,
taxation to aid, 509.
PRIVATE RIGHTS,
due process to secure, 192.
PRIVATE ROADS,
taxation for, 479.
PRIVATE SPURS,
eminent domain for, 476.
PRIVATE WAYS,
public purpose, 450.
PRIVILEGES AND IMMUNITIES,
due process includes, 19, 279, 408.
equality, 268.
meaning of, restricted by courts, 339.
non-resident license fees, 282.
PRIVY COUNCIL,
See Board of Trade.
PROBATE CASES,
jury trial unnecessary in, 210, 212.
PROCEDURE,
See Hearing; Notice and Hearing; Procedure, Summary.
administrative, see Administrative Procedure.
admiralty, 100, 211, 212.
affirmation instead of oath in, 106.
appeals, see Appeals.
arrest must not be arbitrary, 33, 40, 82.
assessment, 211, 212, 220-222, 460, 462, 463.
bail and due process, 110.
bankruptcy, 210, 212.
bastardy, 210.
Blackstone on regular judicial, 82.
bonds and mortgages, summary execution of, 113, 210, 267.
Bracton on, 41, 42.
class legislation, 135, 260, 262, 263.
Coke on requirements of due process, 76-78.
colonial view, 12, 13, 105, 106, 123, 133-136, 140, 141.
common law basis of due process, 81, 100, 113, 140, 141, 197, 208, 241-245.
contempt, 107, 209, 226.
corporations, service of process on, 409-411.
courts martial, 211.
Court of Star Chamber not due process, 7, 73, 81.
criminal,
Fifth Amendment, 16.
Fourteenth Amendment, 19.
indictment by grand jury, see Grand Jury.
separated from provisions protecting, 23, 24.

[*References are to Pages.*]
PROCEDURE—Continued.
delinquent children, confinement of, 210.
deportation, 225, 235.
diseased persons, confinement of, 209, 210.
due process,
colonies, 106.
development of, as limitation on, 593, 594.
early connection with, 197.
equality concept developed from, 261.
legislative changes of, 192-207.
police power cases, 309, 311.
principal requirement of, before Civil War, 182, 183.
protected more than, 123.
summary of protections of, 180.
eminent domain, 211, 212, 215, 222-224, 482.
English,
due process, 71-74, 76.
indictment by information, 82.
Magna Carta, 41, 42.
not specified, 72, 83.
outlawry, 41.
reasonableness a criterion, 72.
equality concept developed from, 256-262.
equality related to, 265.
estates, administration of, 210.
ex parte, 224-226.
forfeiture, 234.
form may vary, 34-36, 41, 123, 140, 141, 197, 213, 228, 250, 251.
guardianship cases, 210.
habeas corpus, 211, 212.
immigrants, exclusion of, 235.
indictment, see Indictment.
inebriates, confinement of, 210.
informal, 224-228.
intoxicating liquor cases, 217-219, 315-320, 351, 355.
judicial might violate due process, 214.
judicial, unnecessary, 82, 224-226, 232, 262.
jury trial, see Jury Trial.
king, order of, as a legal, 42.
legislative, not due process, 192-207, 262, 318.
legislature, changes by, 197, 250, 268.
liquor cases, 217-219, 315-320, 351, 355.
mortgage foreclosure against service men, 348.
new trial, legislative grant of, 268.
New York attempt to specify what was due process (1846), 170.
notice and hearing as due process, 208-240, 419, 420.
paupers, confinement of, 210.
petit cases, 209-211.
police power cases, 226-232, 309, 313.
prejudiced trial, 110, 557, 558.
prescription as basis of due process, 251, 252.
probate, 210, 212.
proof may not be refused, 225, 226.
quasi-judicial determinations, 226-228.

[*References are to Pages.*]

PROCEDURE—Continued.
quasi-legislative determinations, 229-232.
regularity as element of, 41, 71-74, 76, 82, 105, 139, 180, 183, 197, 214, 258.
settled usage as basis of due process, 246-250.
summary,
administrative, 226-228.
bond and mortgage execution, 113, 210, 267.
confiscation by, 48.
contempt proceedings upheld, 53, 107.
Court of Star Chamber at first, 73.
courts' aversion to, 236.
emergency destruction of property, 227, 228, 308, 345.
governmental debts, collection by, 197, 204, 271.
illegal in 1648, 76.
intoxicating liquor, 217, 218, 314-320, 351, 355.
land title cases, 40.
Petition of Right prohibited, 80.
rebellion put down by, 183.
slave sales, 312.
tax collection, 96, 193, 241, 259, 320.
treason, 72.
vagrants imprisoned by, 311.
Supreme Court decides a few cases of, 254, 255.
taxation, 220-224, 233, 438, 482.
Torrens land acts, 226.
witnesses, hearing of, 225.

PRODUCTIVITY,
as public purpose, 455.

PROFESSIONS,
licenses to limit, 546.
right to practice, 585.

PROFITEERING,
acts against, must be definite, 356, 357.
housing, 283, 355, 542.
necessities of life, 282.
regulation of, 352.

PROHIBITION,
See Intoxicating Liquors.
federal power over, 353.
intoxicating liquor, 206, 320-323, 340, 353, 525, 542, 544, 577, 578.
malt liquors, 324, 578, 587.
opium, 323.
revocation of charter of beer company under, 386.

PROOF,
See Facts.
administrative body may reject certain, 228.
opportunity for, required in due process procedure, 225, 226.

PROPERTY,
See Assessment, Special; Confiscation; Eminent Domain; Police Power.
abatement of, in emergency, 226-228.

[*References are to Pages.*]

PROPERTY—Continued.
common law protection of, 582.
confiscation under reserve power, 417-420.
Congress discussed meaning in proposing Fourteenth Amendment, 165.
Cooley focused due process on rights of, 185.
corporate rights of, 389-392.
destruction of, under police power, 347.
enjoyment part of right of, 206.
franchises as, 421-423.
hearing necessary to divest, 217.
intoxicating liquor may be destroyed, 318, 323.
police power not to conserve values in, 560.
public,
individuals may not be given, 487, 496.
railroads given, 489.
public purpose to conserve values, 452, 560.
removal of, by army in war time, 344-346.
taxation limited by rights of, 439.
sale part of right of, 206.
Vermont Constitution, 14, 316.
Virginia Declaration of Rights (1776), 14, 17.
water rights as, 198.

PROPRIETARY CONTROL,
class legislation under, 282, 293, 294.

PROPRIETARY ENTERPRISE,
fees,
operating, not a tax, 122.
discriminatory, 282.

PROSPERITY,
as public purpose, see Economic Benefits.

PUBLIC DEFENSE,
public purpose, 519-523.

PUBLIC IMPROVEMENTS,
assessments, 440, 441.
cooperative improvement as, 460.
corporations forced to make, under reserve power, 427-429.
drainage, 454-459.
nuisance abatement, 453.
sewers, 453.
sidewalks, 453.
streets, 445-451.

PUBLIC LANDS,
licenses to graze on, 282.
power to dispose of, 122.

PUBLIC NECESSITY,
due process, 344.
emergency doctrine related to, 349, 350.
reasonableness, 349.

PUBLIC OFFICIALS,
free passes for, 396.

[*References are to Pages.*]

PUBLIC OPINION,
constitution not to bend to, 582.
courts influenced by, 541.
custom, 584.
debatable questions important in, 586.
evidence of facts, 582-588.
judicial notice, 545, 583, 586.
kinds of, 584-588.
presumption of, relation to validity, 587.
public sentiment, 585.
remedy for violations of due process, 107.
settled conviction, 585.

PUBLIC POLICY,
principles of, worked out by common law, 253.

PUBLIC PURPOSE,
agricultural credit, 527.
agricultural societies, 506.
benefits as element in, 451, 452.
bridges, 471, 478.
burglar alarm, 477.
canals, 471, 478.
celebrations of historical events, 506.
cement plant, 535.
cemeteries, 503.
charity, 507-510.
coal distribution, 532, 533.
communication as, 449-453, 456, 471-498, 525.
congestion relief, 527.
congressional determination of, 516.
Cooley recognized as necessary to due process, 186.
cooperative improvement, 466, 467.
definition of, 536.
degrees of, 482.
development of requirement of, 438-441.
drainage, 454-459, 524, 526.
due process,
court slow in linking with, 434.
not an outgrowth of, 441.
principle of, 597.
economic benefits, 452, 473, 490, 491, 511, 536, 560.
education, 505, 506.
electric light plants, 529.
electric power line, 477.
elevators, 475, 503.
eminent domain,
federal provisions for, 434.
requirement of, 434, 435.
state provisions for, 434, 435.
emergency relief, 511.
employees compensation, 518, 519.
employment opportunities, 455.
enlistments, fostering, 519-523
equality of opportunity as, 536.
erosion, prevention of, 460.

[*References are to Pages.*]

PUBLIC PURPOSE—Continued.
express companies, 475.
fairs, 506.
federal government and limitations on, 496.
ferries, 471, 472.
fire equipment, 525.
forestry, 497.
fraud prevention, 540.
freight railroads, 473.
gambling prevention, 564.
garbage disposal, 529.
governmental buildings, 505.
governmental support, 379.
grocery, 496.
health, 453-459, 497, 512, 513, 528, 529, 560.
hotel, 504.
ice plants, 534.
incidental character of taking does not determine, 491.
incidental enterprises, 534, 535.
increased value as, 452.
individual benefit included, 455.
individual, gifts to, not, 115, 116.
industrial peace, 560.
irrigation, 461-466, 528, 569.
John Adams on necessity of, in laws, 181.
judicial leniency on questions of, 459-500.
jury not to decide, 211.
justice requires, 181.
Kent on necessity of, for due process, 182.
legislative power to determine, 463.
levees, 459, 460.
lumbering, 477, 497, 503.
manufacturing, 489-491.
mills, 472, 489-491, 496.
mining, 478, 503.
mining tunnel, 477.
moral obligation, 498, 513-523.
natural right, 200.
navigation, 477.
necessity, 503.
nuisances, abatement of, 526.
people benefited not determinative, 462
oiling station, 496.
oil refinery, 535.
parks, 524.
passenger railroads, 473.
patriotism, 519-523.
peace, 473, 560.
pipe-lines, 476.
playgrounds, 524.
pleasure, 478.
poor relief, see Paupers.
police measures, 525, 526.
police regulations require, 340.

[*References are to Pages.*]

PUBLIC PURPOSE—Continued.
private enterprises,
charitable institutions, 507-509.
docks, 477.
railroads, 473, 476.
roads, 450, 479.
water companies, 496.
productivity, 265, 455.
prosperity, 458, 461, 462.
public defense, 519-523.
public utility must serve, 469.
railroad reservoirs, 475.
railroads, 471-476, 479-489.
reclamation, 457, 460.
recreation, 451, 454, 478.
reformatories, 544.
religious support, 115, 116.
roads, 471, 478.
safety, 459, 460, 497, 512, 530.
salaries of officers, 505.
salt production, 497.
sea-wall, 460.
sewers, 524.
sidewalks, 453.
soldiers' bonus, 519-523.
street railways, 475.
streets, 195, 449-451.
street sprinkling, 454, 525.
street sweeping, 454.
subway, 477.
sugar production, 497, 498.
taxation,
federal provisions for, 435, 436.
required in, 492-497.
state provisions for, 435-438.
telegraph, 477.
telephone, 477.
water power, 499-503.
water supply, 461, 528.
worker's health protection, 560.

PUBLIC SERVICE,
pensions for, 518, 519.

PUBLIC TRADING,
See MUNICIPAL TRADING.
Massachusetts amendment to Constitution to permit, 511.
validity of, 524-537.

PUBLIC UTILITIES,
cemeteries, 503.
characteristics of, 468-471, 499.
coal, 532.
common benefit, 531, 532.
common law recognition of, 469, 470.
definition of, 474, 475.

[*References are to Pages.*]

PUBLIC UTILITIES—Continued.
elevators, 333, 503, 535.
government aid required, 530.
hotel, 504.
ice plant, 534.
legislative power to create, 492-502.
liability of, 470.
lumbering, 503.
mills, 490, 499.
mines, 503.
monopoly, characteristics of, 470, 532.
municipal ownership of, 528-535.
municipal use of products of, 530.
open to all on equal terms, 470, 500.
public benefit not basis for distinguishing, 468, 469.
rate regulation, 339, 394-396, 431, 470.
regulation of, 394-406.
serve all alike, 470, 500.
service, regulations of, 399.
stockyards, 333.
transfers on street railways, 396.
warehouses, 333.
water power, 499-503.

PUBLIC WELFARE,
reserve power, 373, 393-433.

PUMPS,
for draining swamps, 443.

PURPOSE, PUBLIC,
See PUBLIC PURPOSE.

Q

QUAKERS,
affirmation by, instead of oath, 106.
enthusiasm for Magna Carta, 106-108.

QUASI-JUDICIAL DECISION,
appeal necessary from, 341.

QUASI-JUDICIAL DETERMINATIONS,
courts in applying due process, 601, 602.
hearing required in, 226-228.
nature of, 226.

QUASI-LEGISLATIVE DETERMINATIONS,
nature of, 226.
proceedings for, 229-232.
reasonableness necessary, 230-232.

R

RACE,
See CHINESE; NEGROES.

RAILROAD COMMISSION,
railroads to support, 379, 396, 425.

[*References are to Pages.*]

RAILROADS,
cattle guards must be provided by, 313, 426.
cattle scales law, 428, 560.
children carried for half fare, 429.
classification by length, 551.
common carrier, 428, 470, 472, 581.
donations to, 479, 489, 497.
economic importance of, 338, 474.
eminent domain,
access to car barns by, 485.
control of another line by, 473.
double tracking by, 475.
freight facilities by, 475.
freight railroad, 473.
grade crossings abolished by, 475.
mining rights by, 478.
passenger, 473.
pleasure railroad, 478.
private, 473.
public purpose of, 471-476.
reservoirs by, 475.
rights of way over other lines by, 473.
side tracks by, 475.
spurs to private plants, 486.
terminal facilities by, 474, 475.
topographical changes by, 475.
extension of lines required, 428.
fencing right of way required, 425, 426.
franchise forfeiture by, 421.
government may build, 480.
grade changes by, 403.
grade crossings,
abolition of, 403, 404, 430.
maintenance of, 401, 402.
protection of, 404, 405.
regulation of, 430, 431.
grain elevators, 341.
grants to, 484-489.
improvements required of, 400-406.
Jim Crow car law, 582.
legal position of, peculiar, 428, 472, 473, 483, 581.
loan of municipal credit to, 487-489.
locomotives and fires, 555.
monopolies, 332.
passengers may not be put off between stations, 427.
passes to public officials, 396, 425, 427.
paving required of, 400, 401, 445.
public utilities, 470.
rate regulation of, 339, 341, 394-396, 429, 431, 472.
reserve power, 372.
script book regulations, 432.
service requirements of, 399, 472, 473.
sidewalks around stations, 453.
sidings must be provided, 426.

[*References are to Pages.*]

RAILROADS—Continued.
soliciting on trains forbidden, 564.
station facilities, 397-399, 428, 453.
steam engines prohibited on certain streets, 429.
stock killed, double damages for, 273.
stock subscriptions by cities, 479-489.
taxation of, 419, 420.
taxation to aid, 479-489, 497.
union station requirements, 397, 428.
wage payment regulations, 412-414.
wages, fixing of, 354.
weeds must be destroyed, 564.

RATE REGULATION,
agreements, 396.
appeal necessary from decision of commission, 232, 341.
children's half fare, 429.
class legislation, 341.
elevator, 333.
engineering evidence in, 576.
ferry, 472.
lawyers' fees in Virginia, 115.
master in chancery to determine reasonableness, 550.
mills, 472, 490.
police power, 394-396, 549, 550, 554.
public utilities, 339, 470.
railroad, see Railroads, Rate Regulation.
reasonableness required, 230-232, 334, 339, 342, 550.
reserve power, 427, 431, 432.
stockyards, 333.
warehouses, 333.

REAL ESTATE,
municipal trading in, 459, 526, 527.
state trading in, 527, 528.

REASON,
due process and common, 198.

REASONABLENESS,
balance of convenience as, 423, 424.
due process requires, 214.
English procedure demanded, 72.
legislature classifications are prima facie, 551.
Magna Carta, in colonies, 137.
police power, 336, 561, 570.
procedure, 72, 254.
public necessity, 349.
quasi-legislative determinations, 230-232.
rate regulations, 334, 339, 431.
reserve power, 424.
union station requirement must be, 428.

RECALL,
movement for judicial, 582.
validity of, 239.

RECLAMATION,
as public purpose, 457, 460.

[*References are to Pages.*]

RECONSTRUCTION,
radicals in Congress during, 167.
railroad liquidation during, 480.
Supreme Court's lethargy during, 332.

RECONSTRUCTION COMMITTEE,
ability of members, 165.
equality clause, why desired, 276, 277.
journal of, 161.
radicals in, 167.

RECREATION,
public purpose, 451, 534.

REFERENDUM,
facts shown by, 536, 537.
public opinion shown by, 583.

REFORMATION,
influence in England, 6.

REFORMATORIES,
taxation for, 544.

REGISTRATION OF LAND TITLES,
statute requiring, 266.

RELIGION,
constitution, 147.
disestablishment of, 196, 257.
public support of, in colonial Massachusetts, 115, 117.
Sunday laws and liberty of, 310, 311.

REMEDIAL STATUTES,
class legislation, 259, 262.

REMEDIES,
class legislation, 291.
legislative power to change, 245, 289, 294.
police power cases, 561.

RENTS,
fixing of, under police power, 283, 355, 356, 542, 546, 547.

REPEAL POWER,
See RESERVE POWER.

REPRESENTATION,
taxation without, see Taxation without Representation.

REPUBLICAN FORM OF GOVERNMENT,
courts refused to expand in federal Constitution, 166.

REPUBLICAN PARTY,
platform of 1860, 176, 328.

RESERVE POWER,
assessability of stock, 407.
balance of convenience, 427, 431.
bank liability regulations, 393, 406, 407.
blue sky laws, 408, 409.
cattle guards to be constructed, 426.
cattle scale requirement of railroads, 428.
class legislation and revocation of charters, 391.

[*References are to Pages.*]
RESERVE POWER—Continued.
coal screening acts, 414.
college, control of, 367.
construed strictly, 381, 432.
corporations,
capitalization increased by, 368.
collection of debts of, 366, 394.
combination of, 367, 368.
division of, 368.
laws changed under, 377.
may cease business, 373.
name changed by, 422.
powers of, increased, 366-369.
property rights after revocation of charter, 387, 389-392.
service of process on, 409-411.
service regulation, 409.
termination of existence of, 385-392.
transfer of rights, 369.
cumulative voting, 370-371.
Dartmouth College Case, 361-365.
dividends may not be impaired by, 371.
due process a limitation of, 417-420, 594.
extent of use, 363-365.
facts decided by state courts, 579.
fish-ways over mill dams, 406, 427.
franchises as property, 421-423.
free transportation requirements, 427.
grade crossing regulations, 401-405, 430.
improvements required under, 405, 427-429.
insurance companies, 369, 394, 408.
jurisdiction of, 423.
labor regulation under, 411-415.
licenses,
domestic corporations, 380.
foreign corporations, 377.
limitations on, 365, 366, 381, 382, 387, 396, 397.
locks must be built around dam, 406.
milk regulations, 400.
minimum wage laws, 414.
minority protection by, 369.
mismanagement prevented under, 369.
monopoly regulation, 415-417.
new functions granted by, 372, 373.
passes to public officials over railroads, 396.
police power, 369, 374, 393-399, 406-414, 423, 424, 431-433.
privileges and immunities clause, 408.
privileges granted by, 367.
provisions for, 363, 364.
public improvements under, 405, 427-429.
public welfare, 393-433.
railroads,
destination charges, 372.
extension of lines required, 428.
passengers not to be put off between stations, 427.

[*References are to Pages.*]

RESERVE POWER—Continued.
railroads,
service regulations of, 399.
sidings required, 426.
rate regulation under, 394-396, 427, 429, 431, 432.
reasonableness necessary, 405, 406, 413, 424.
removal of cases to federal courts, 388.
school regulations under, 369.
service letter law, 415, 586.
sinking funds under, 424.
sleeping car regulations, 427.
speculation prevented under, 370.
station facilities, regulation of, 397-399.
steam engine prohibited on street, 429.
store order legislation, 414.
street railroads,
improvements required of, 429.
transfer requirements of, 396, 429.
strictly construed, 381, 432.
taxation under, 385, 419, 420.
tax exemption repeal, 374-377, 382-385.
telegraph, 373.
union station required of railroads, 428.
vested rights, 370, 433.
wages, payment of, 413, 414.
workmen's compensation acts, 415.

RESERVOIRS,
eminent domain for railroad, 475.

RESIDENCE,
discriminations based on, 281, 282.
zoning of negro, 560.

RESIDUAL CONTENT,
colonists considered due process contained, 123, 142.
English view of due process as having, 75, 86.
importance of, in due process, 589-593.

RETIREMENT PENSIONS,
validity of, 519.

RETROACTIVE STATUTES,
arbitrariness, 260.
courts will interpret prospectively, 196.
cumulative voting laws, 370, 371.
increase of bank's liability, 393, 394.
inheritance, 264.
marriage, 264.
moral obligations, 513-523.
railroads, loans to, 479.

REVOLUTION, AMERICAN,
influence on due process of, 125-142.

RICHARD II,
deposition of, 40, 44, 74.

RIGHT OF WAY,
See Railroads.

[*References are to Pages.*]

RIGHT TO SUE,
class legislation restricting, 264.
RIOT,
destruction of liquor in case of, 351, 355.
RIVERS,
See STREAMS.
ROADS AND STREETS,
assessments for, 458.
benefits and public purpose, 450.
commissions, procedure of, 215.
eminent domain for, 471, 478.
lighting of, 450, 451.
private, 266, 450, 451.
public purpose, 449-451.
public utilities, 470.
side roads, 450.
taxation for, 478, 479.
toll, franchise rights of, 422.
ROMAN LAW,
influence on English constitution, 47.
ROUND HOUSE,
destruction of, for grade crossing, 430.
ROUSSEAU, J. J.,
doctrine of common will, 585.
RULES OF LAW,
vested rights in, 289.

S

SAFETY,
as public purpose, 459, 460, 497, 512, 530.
regulations for, 541, 554.
SALOONS,
tax discrimination on, 544.
women's work in, 268.
SALT,
bounty on, 497.
SAWMILL,
operation of railroad by, 581.
SCHOLARSHIPS,
validity of public University, 510.
SCHOOLS,
book monopoly, 331.
discriminations in, 276.
eminent domain for, 506.
foreign language acts, 351, 355.
grants to private, 508.
Indians discrimination, 294.
private may not be prohibited, 355.
reserved power, 369.
taxation for, 505.

[*References are to Pages.*]

SCHOOLS—Continued.
teachers' pensions, 519.
teach, right to, 355, 575.
vaccination of children in, 347, 348.
SCIENCE,
evidence of, in police power cases, 576, 577.
rapid growth of knowledge of, 543, 547.
SCOPE,
Cooley on wide due process, 184.
SCOPE OF DUE PROCESS,
discussion of, in California convention, 172.
extension of, 591.
restriction of, by Maryland in 1851, 174, 175.
SCRIPT BOOKS,
regulations of railroad, 432.
SEARCH AND SEIZURE,
summary contrary to law of land, 48.
SEARCH WARRANTS,
colonial opposition to, 125-127.
SEA-WALL,
construction of, 460.
SEED,
taxation to purchase for farmers, 512.
SELECTIVE DRAFT ACT,
validity of, 346, 348.
SELF-DEFENSE,
summary procedure valid in, 183.
SELF INCRIMINATION,
due process does not include, 205, 207, 290.
SEPARATION OF POWERS,
due process, 418.
practical basis of, 599.
special legislation limited by, 268.
SERVICE LETTER LAW,
validity of, 415, 586.
SETTLED USAGE,
common law procedure as, 241-245, 251.
evidence of what is due process, 252.
norm for due process, 241-255
police power cases, 541, 573.
prescription as basis of due process, 251.
principles of common law as, 245-250.
railroad aid by taxation, 482, 483.
SEWERS,
assessments,
building by, 453, 454, 567.
upkeep by, 443.
eminent domain for, 524.
police regulations, 307.
taxation for, 524.

[*References are to Pages.*]

SHAKESPEARE,
reflected legal ideas of time, 46, 47.
SHARPE, GLANVILLE,
on parliamentary supremacy, 63-65.
SHEBBEARE, JOHN,
condemned parliamentary supremacy, 61, 62.
SHEEP,
funds for protection of owners, 424, 425.
SHIPPERS,
free transportation for, 427, 428.
SHIPPING,
municipal coaling of ships, 533.
regulations of, 304, 306, 307, 313.
SICK,
tax for care of, 507.
SIDE WALKS,
assessments for, 453.
rights of property owner in, 453.
SINKING FUNDS,
validity of, 424.
SIXTH AMENDMENT,
Act of Congress held void under, 205.
SLAUGHTER HOUSES,
police power regulations, 330-332.
rate regulation of, 333.
SLAVES,
Dred Scott decision, 327.
due process declared violated by holding, 176, 183.
emancipation of, 198, 259, 263.
importation of, 198, 328.
living condition regulations, 308.
property in, 327.
traffic in, regulated, 312.
SLEEPING CARS,
regulations of, 427, 578.
SMALL CLAIMS,
statutes cutting down right to sue for, 264.
SMITH, J. TOLMIN,
due process limited delegation of legislative power, 86.
parliamentary supremacy, 67, 68.
summary procedure, opposed, 83.
SMOKE,
regulations of, 304.
SOCIAL COMPACT,
principles of, as legislative limitation, 199.
unjust laws contrary to, 259.
SOCIAL CUSTOMS,
judicial notice of, 545.

[*References are to Pages.*]

SOCIALISM,
See MUNICIPAL TRADING.
Anglo Saxon tradition, 590.
Massachusetts constitution amended to permit, 511.
municipal fuel yards, 574.
railroads built by government, 480.
validity of state, 524-537.

SOCIAL LEGISLATION,
See LABOR LEGISLATION.

SOCIAL PRINCIPLES,
courts have refused to define, 253.
due process based on, 252, 253.

SOCIOLOGISTS,
facts presented by, 577.

SOLDIER'S BONUS,
Civil War, 519, 520.
moral obligation arising from, 521.
World War, 521-523.

SOLDIER'S MONUMENT,
taxation for, 524.

SOVEREIGNTY,
police power, 300, 302-304.

SPECIAL ASSESSMENTS,
See ASSESSMENTS, SPECIAL.

SPECIAL LEGISLATION,
See CLASS LEGISLATION.

SPECULATION,
reserve power used to prevent, 370.

SPEECH,
lack of provision for free, in Constitution criticized, 151.
liberty of, in war time, 346.

SQUATTER'S LAWS,
validity of, 268.

STAMP ACT,
Adams, S., 127, 128.
colonial opposition to, 127-136.
due process, 134.
repeal demanded, 130.

STAMP ACT CONGRESS,
due process of law not quoted, 12.
Magna Carta protected trial by jury, 134.
meeting of, 127.

STAMP TAX,
Otis, 127, 128.
validity questioned, 128, 132, 133.

STARE DECISIS,
constitutional cases, 553, 601.
facts not basis for, 542, 545.
judicial functions, 600, 601.
no application to questions of fact, 542.
police power cases, 542.

[*References are to Pages.*]

STATE CONSTITUTIONAL CONVENTIONS,
See CONSTITUTIONAL CONVENTIONS.

STATE CONSTITUTIONS,
See CONSTITUTIONS, STATE.

STATE COURTS,
appeals prevented by, to Supreme Court, 342.
conservative nature of, 580.
construction of state acts by, followed in federal courts, 357.
due process enforced by, 338.
facts determined by, 533, 573, 574, 578, 579.
federal decisions not binding, when, 580.
local conditions determined by, 533.

STATES,
See CONSTITUTIONS, STATE.
Fifth Amendment not a limitation on, 18, 176, 203.
foreign corporations may be excluded, 374, 375.
police power, 302.
suits against, 269, 292.

STATIONS,
See RAILROADS.

STATISTICS,
as evidence in police power cases, 576.

STATUTE OF LIMITATIONS,
change by legislature in particular case, 257.

STATUTES,
Adamson Law, 357-359.
alien land law, 575.
anti-injunction acts, 288.
Ball rent law, 353.
burnt record acts, 345.
California drainage act, 458.
cave-in act for coal mines, 351.
conjectural dangers, 351.
construction of,
Constitution, will be given, 50.
creation of public utilities, 500.
English courts, 43, 44, 69, 70.
notice and hearing implied, 230, 240.
permit appeals from administrative decisions, 230.
prospective, 201.
summary process avoided, 236.
Supreme Court follows state courts, 579.
crudeness will not invalidate, 566.
curative and class legislation, 260, 262, 263.
Esch-Cummings act, 398.
espionage act, 346.
foreign language acts, 351, 355.
Jim Crow car law, 582.
judiciary act, 579, 581.
Lever act, 282, 356, 357.
Lex Regia, 46.
Magna Carta in mediaeval England, 43, 44.

[*References are to Pages.*]

STATUTES—Continued.
maternity act, 497.
minimum wage laws, 354.
presumption of validity, 557, 562, 566, 573, 574, 576.
remedial, 259, 262.
retroactive, 260.
Saulsbury resolution, 283.
selective draft act, 346, 348.
tenement house law, 556.
vested rights, 201, 263.
war time, 344-346, 352, 353.
Wisconsin upper-berth law, 427.
Wright Irrigation Act, 461-465.

STEAMBOATS,
regulations of, 304-306.

STOCK, CORPORATION,
assessability changed, 371, 407.
capitalization changes, 368.
dividend payments from capital, 369.
eminent domain to condemn railroad, 473.
future trading in, 564, 572.
liability of owners increased, 393, 394.
municipal subscriptions to railroad, 479-489.
property of owners can not be confiscated, 417-420.
subscriptions for, 373.
voting strength to correspond to ownership, 370.

STOCK, ALIVE,
See CATTLE.

STOCKYARDS,
rate regulation of, 333.

STONE QUARRY,
eminent domain for public, 524.
municipal ownership of, 534.

STORE ORDER LEGISLATION,
validity of, 412, 413.

STORY, JOSEPH,
conception of due process, 180, 181.
Fifth Amendment and the states, 203.
influence of, 180.

STREAMS,
damming of, 306, 489, 490.
eminent domain, 330, 489, 490.
flow regulation, 459, 460.
locks in, 406.
mill acts, 491.
police regulations, 307.
prevention of erosion, 460.
state's control over, 460.

STREET RAILWAYS,
children's fare on, 429.
eminent domain for, 475.
franchise withdrawal, 389.

[*References are to Pages.*]

STREET RAILWAYS—Continued.
injuries to street by, 401.
municipal ownership, 531.
paving required of, 401, 429.
service regulated, 399.
sprinkling tracks, 429.
street lighting required, 429.
transfer regulations, 396, 429.

STREETS,
See ROADS.
assessments to improve, 442, 445-449.
eminent domain for, 195, 527.
improvement of, as public purpose, 449, 451.
lighting of, 332, 429, 450, 451, 530.
paving of, 400, 429, 442.
sprinkling,
assessments for, 454.
street railways, 429.
sweeping, 454.
taxation for, 525.
use of, mayor's control over, 552.

STRIKES,
anti-injunction laws, 288.
emergency created by, 351, 352.

STRUCK JURY,
validity of, 213, 248.

STUMPS,
assessments for clearing land of, 466, 467.

SUBWAY,
eminent domain for, 477.

SUFFRAGE,
due process, 172, 595, 596.

SUGAR,
bounty on, 497, 498.

SUIT,
right of, as part of due process, 264, 289, 292.

SUMMARY ABATEMENT,
buildings where liquor is sold, 319.
hearing necessary to assess costs, 228.
intoxicating liquors, 314, 316-320.
notice and hearing, 226-228.
statutes construed to prevent, 69.

SUNDAYS,
barber-shop closing on, 545, 555.
liquor sales on, 326.
police power regulation of, 309-311, 545.
summary procedure for non-observants, 194.

SUPREME COURT,
assessments, 445-449.
change of attitude in eighties, 245, 246.

[*References are to Pages.*]

SUPREME COURT—Continued.
constitutional appeals to, 580, 581.
constitutional doctrines developed slowly, 295.
divided court affirms decision, 579.
Dred Scott decision, 327, 328.
equality and due process, 284-292.
equity rules of, 550.
formalistic concept of due process rejected, 246.
jury trial and due process, 212.
legal tender cases, 330.
legislature limited by due process, 204.
local conditions unknown to, 572.
moral obligations, 515.
overworked condition of, 581.
police power and due process, 188, 329-343.
privileges and immunities clauses, 339.
procedural cases few, 255.
purposes of federal taxes, 435, 436.
railroad grants, 487.
reconstruction lethargy of, 332.
reluctance to apply due process to,
Congress, 205.
police power, 332-339.
state legislatures, 206.
rules of constitutional construction, 295-298.
state courts' construction of law followed, 357, 487, 537, 578, 579.
state courts more conservative than, 342, 580.
sugar bounty constitutionality evaded, 498.
summary procedure, 194.
vested rights, 201, 203.
Warren on attitude toward due process, 190.
writs of certiorari by, authorized, 581.

SWAMP,
drainage by assessment, 442.
dumping stations by assessment, 443.

T

TABOO,
police power related to, 300.

TAFT, W. H.,
equality and due process, 287-293.

TALLOW WORKS,
regulation of, 197.

TAXATION,
agricultural aid, 512.
agricultural societies aided by, 506.
amusement parks supported by, 534.
assessments, see Assessments, Special.
banks, support of public by, 527.
benefit theory of, 442.
blind, support of, 510.
bridges built by, 478.

[*References are to Pages.*]

TAXATION—Continued.
burial of dead, payments for, 502.
business losses, payments for, 517.
canals, built by, 478.
cement plant, supported by, 533-535.
changes in, 201, 221, 222.
Chinese discriminations in, 268.
city planning, 526.
class legislation, 268, 286, 379-382, 419, 420.
coaling of ships, supported by, 533.
coal yards, supported by, 532, 533.
collection of, 96, 105, 243, 443.
colonists,
arbitrary, not valid, 123, 124.
governors' power to levy fees, 118, 119-122.
jurisdiction necessary for, 127-136.
problems regarding, 115-122.
summary procedure for collection, 96, 105.
congestion relief by, 527.
congressional power over, 151, 286, 435, 496.
constructive benefit doctrine, 531.
Cooley on due process, 185-188.
corporations,
capital stock of, 374.
discriminatory, 379-382.
license fees on domestic, 378-380.
license fees on foreign, 375-377, 388.
repeal power, 374-385.
courts try to uphold, 496.
cyclone relief from, 512.
discriminatory, 379-382, 544.
drainage, payments for, 454-459, 524, 526.
due process, 183, 188, 189, 280, 437-439, 480, 594.
economic benefits as purpose for, 452, 511.
electric appliance shop, supported by, 529, 534.
electric light plants, supported by, 529, 530.
emergency relief by, 511-513.
eminent domain related to, 444, 482-484.
exemptions from, 374-377, 382-385, 498.
fairs, supported by, 506.
fire equipment purchased from, 525.
firemen's bonus, payments for, 518.
firemen's pensions, payments for, 508, 518.
fire relief, payments for, 511.
flood relief, payments for, 512.
forestry bounty, payments for, 497.
G. A. R. post, supported by, 506.
gifts to individuals, payment of, 115, 116.
harbor project, payments for, 526.
hearing,
opportunity for injunction as, 224.
opportunity to make formal statement as, 224.
requirement of, 222.
specific taxes do not require, 233.
suit for collection as, 223.

[*References are to Pages.*]

TAXATION—Continued.
historical celebrations, payments for, 506.
hotel, supported by, 504.
ice plants, supported by, 533.
importance of, to government, 220.
inebriates, care of, by, 507.
insane, care of, by, 507.
interest rate on state bonds, increase in, 517.
interstate commerce and state, 376.
irrigation, payments for, 461-465.
jurisdiction, 125, 127-136.
law enforcement, payment of damages due to, 514.
legal claims, payments for, 513.
levees, maintained by, 459, 460.
liability for, is personal, 443.
library, supported by, 506.
licenses,
bakeries, 307, 308.
object of, 546.
theatres, 565.
warehouses, 333.
limitations on, 438-442, 494, 495.
liquor dispensary, supported by, 525, 526.
Locke declared people must consent to, 58.
manufacturing aided by, 492-497.
medical treatment during epidemic, 513.
method of, changes under reserve power, 385.
moral obligations, payments of, 498, 513-523.
mothers' pensions, payment of, 497.
oil refinery, supported by, 535.
pardoned convict, payment of damages to, 517.
parks, supported by, 524.
paupers, support of, 507, 509, 510.
penalties, 241, 380, 381.
pensions, payments for,
Civil War veterans, 521.
dependents of public employees, 518.
firemen, 508, 518.
militiamen, 519, 520.
mothers, 497.
retirement, 519.
teachers, 519.
playgrounds, supported by, 524.
plumbing store, support of, 534.
police power, 313, 482, 483, 525, 526, 536.
power plant, supported by, 529.
private institutions, supported by, 507-509.
private roads, built by, 479.
private schools, supported by, 508.
procedure,
administrative, 220-225.
eminent domain, 482.
notice and hearing, 222-224, 419.

[*References are to Pages.*]

TAXATION—Continued.
procedure,
proof may not be refused, 225, 226.
prosecutions differ from, 241.
summary, 193, 241, 259, 320.
proprietary fees are not, 122.
public buildings, built by, 505.
public elevator, built by, 535.
public theatre, built by, 534.
public purpose,
benefits to community, 451, 452.
requirement of, 115, 200, 435-439, 492-497.
public utilities may use, 470, 471.
railroads, aid to, 419, 420, 479-489, 497.
reformatories, supported by, 506, 544.
religion, payments for, 115, 116.
roads, built by, 449-451.
salaries of public officers, payment of, 505.
salt bounty, payment of, 497.
schools, supported by, 505.
scholarships in universities by, 510.
scope of power, 437, 438.
seed purchase during drought, payments for, 512.
sewers, built by, 524.
sick, payments for care of, 507.
sidewalks, built by, 453.
soldiers' bonus, payment of, 519-523.
soldiers' monument, built by, 524.
state constitutional provisions on, 435-438.
stone quarry, supported by, 534.
street railway lines, support of, 531.
streets, maintained by, 449-451.
streets, sprinkling of, 525.
sugar bounty, payments for, 497, 498.
summary collection of, 193, 241, 259, 320.
Supreme Court on purposes of federal, 435, 436.
town clock, supported by, 525.
treaty claims, payments for, 517.
turnpikes, aid to, 478.
unlimited character of power, 482.
water supply, support of, 461, 528, 530.

TAXATION WITHOUT REPRESENTATION,
colonial arguments opposing, 127-136.
colonial struggles with executive levy of fees, 119-122.
due process, 85.
Stamp Act, 130-133.

TAX COLLECTOR,
repayment for bad note received, 517.
summary procedure against, 243, 271, 272.

TAX PAYER,
interest of in public funds, 496, 497.

TAYLOR, HANNIS,
Coke misleading expounder of Magna Carta, 25, 26.
criticism of Murray case, 243.

[*References are to Pages.*]

TELEGRAPH,
eminent domain for, 477.
public interest in, 373.

TELEPHONE,
eminent domain for, 477.
monopoly, 331.

TENEMENT HOUSES,
regulation of, 556.
regulation of labor in, 546.

TENNESSEE,
equality concept of due process developed in, 261-265, 271.

TENTH AMENDMENT,
purpose of, 160.
taxing power left with states, 495.

TERMINAL COMPANIES,
eminent domain used by, 474, 475.

TEST OATHS,
validity of, 311, 312.

TEXT WRITERS,
See COMMENTATORS.

THEATRES,
license fees, 565.
municipal ownership, 534.
removal of hats by women, 545.

TITLES, LAND,
See LAND TITLES.

TOBACCO,
judicial notice of health character of, 546.
manufacture of, in tenements, 556.
regulation of use of, 559.
summary collection of tax on, 241.

TOPEKA BRIDGE CASE,
discussion of, 494.

TOPOGRAPHICAL CHANGES,
eminent domain by railroad, 475.

TORRENS LAND ACTS,
proceedings under, 226.

TRADING STAMPS,
regulation of, 279, 554.

TRAIN SERVICE,
regulation of, 339.

TRANSFERS,
ordinance compelling free, 396, 429.

TRANSMISSION LINE,
eminent domain for, 477.

TRANSPORTATION,
See COMMUNICATION; RAILROADS; ROADS; STREET RAILWAYS; STREETS.

TREATIES,
enforcement of, 268.
payment of claims under, 517.

[*References are to Pages.*]

TRIAL,
See JURY; PROCEDURE.
TRUAX CASE,
argument of Taft in, 288.
attitude toward public opinion in, 584.
discrimination shown in, 568.
TRUSTS,
See MONOPOLIES.
TUNNEL,
eminent domain for mining, 477.
TURNPIKES,
See ROADS.
TWYSDEN, SIR ROGER,
due process as sum of liberties, 84.
parliamentary supremacy repudiated, 57.

U

UNFAIR COMPETITION,
See MONOPOLIES.
UNIONS,
discharge of men for joining, 347.
UNION STATIONS,
railroads required to build, 397, 398, 428.
UNITED STATES CONSTITUTION,
See CONSTITUTION, UNITED STATES.
UNIVERSITIES,
combination of, under reserve power, 367.
control of, changes in under reserve power, 361, 362, 367.
eminent domain for, 506.
land grants, revocation of, 197, 421.
liquor regulations, 319, 326.
police regulations, 393.
powers to grant degrees, revocation of, 262.
sale of medicinal products by, 535.
scholarships in, taxation for, 510.
soldiers' bonus to encourage attendance at, 522.
USURY,
saving fund associations, 263.

V

VACCINATION,
compulsory, 346-348, 555, 556, 583.
judicial notice of benefits of, 583, 584.
VAGRANTS,
judicial notice of evil of, 544.
summary procedure for imprisonment, 311
"VEL,"
meaning of in Magna Carta, 3, 32-34.
VERMONT,
property not protected by Constitution of, 14, 316.

[*References are to Pages.*]

VESTED RIGHTS,
charter grant, 361, 362.
class legislation, 259, 260, 263.
colonial protection of by due process, 112, 123.
common law, 200, 201.
court decisions creating, 263.
cumulative voting, 371.
Dartmouth College Case, 201, 363.
doctrine of sanctity of, 200-204, 438.
due process took over doctrine of, 112, 113, 194, 202, 203.
English origin of doctrine, 201.
expectancy does not confer, 260, 265.
growth of doctrine, 201.
inheritance, 264.
interpretative statutes affecting, 263.
intoxicating liquor privileges are not, 308.
marriage, 264.
Meyer's analysis of, 187.
navigation as, 307.
New York convention's attempt to protect, 170, 172.
parliament must respect, 48.
reserve power cannot divest, 367, 370, 420, 433.
rule of law confers none, 289.
squatters' laws, 268.
statutes construed to protect, 69, 70, 201.
Supreme Court linked with due process, 203.
tax exemptions not, 382, 384, 385.
will confers none until probated, 260.

VICE,
judicial notice of evils of, 545.

VIRGINIA,
anti-lawyer acts in colonial, 114.
colonial governor's attempt to levy fees, 122.
Declaration of Rights (1776), 14, 15, 17, 21.
disestablishment of church in, 196.
Federal Bill of Rights desired, 159.

VOTE,
no right to, by due process, 595.

VOTING, CUMULATIVE,
See CUMULATIVE VOTING.

W

WAGES,
coal screening acts, 414, 570.
judicial notice of, 546.
minimum, laws for, 354, 414, 571.
payment of,
cash, 412.
discharge, 413, 414.
periodic, 412, 425.
promptness, 412, 413.
regulations of, 432.
railroad regulations, 354, 357-359.
store order legislation, 413, 414.

[*References are to Pages.*]

WAR,
emergency of, 344-346, 352.
legislation during World, 355.
police power and power of, 313, 344.
property taken in emergency of, 345.

WAREHOUSES,
licenses required, 333.
rate regulation of, 333.

WATER,
city's right to use, 405.
eminent domain for companies, 496, 500.
monopoly of supply, 331, 332.
municipal ownership of supply, 461, 528, 530.
rate regulation of, 431.
rights of, are property, 198.

WATER POWER,
eminent domain for, 499-503.
individual enterprise inadequate to develop, 501.
mill acts cases, 499.
public utility, 499-503.

WEEDS,
destruction by railroad required, 564.

WHARVES,
monopolies, 332.
police power, 304.
regulations of, 313.

WILLS,
class legislation regarding, 259.
jury trial unnecessary to probate, 210, 212.
vest no rights until probated, 260.

WISCONSIN,
court's attitude toward railroad grants, 488.

WITNESSES,
administrative board need not hear, 225.

WIVES,
See HUSBANDS AND WIVES.

WOMEN,
hats to be removed in theatre, 545.
hours of labor regulations, 268, 549, 553, 567, 570.
judicial notice of labor conditions of, 546.
jury service exclusion, 270.
liquor sales to, prohibited, 326.
minimum wage laws, 354, 571.
night work regulations, 542, 576.

WORDS,
judicial notice of meaning of, 543.

WORKERS,
class legislation, 288, 289.
compensation to injured state, 515, 516, 518, 519.
employment agency regulation, 560, 561.

[*References are to Pages.*]

WORKERS—Continued.
hours of labor, see Labor, Hours of.
increased efficiency, not a public purpose, 560.
screening laws in coal mines, 425.
service letter law, 415.
wage payments to, 411-414, 425, 432.

WORKMEN'S COMPENSATION LAWS,
common law changed by, 289.
New York ruling on, 569.
reserve power, 415.
validity of, 248-250, 518, 558, 559, 567, 569, 580.

WORLD WAR,
judicial notice of conditions of, 547.
legislation during, 344-346, 352, 353.

WRITERS, LEGAL,
See COMMENTATORS.

WRITS,
due process violated by assistance writs, 125-217.
king could not grant monopoly of issuance, 76.

WYNEHAMER CASE,
importance of, 317.
influence of, 318-320, 328.

Z

ZONING,
validity of, 560.

Total number of pages in this volume, 783.

FORDHAM UNIVERSITY
LIBRARY
NEW YORK, N. Y.

FORDHAM UNIVERSITY
LIBRARY
NEW YORK, N. Y.